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Security-Based Swap Data Repository Registration, Duties, and Core Principles; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–63347; File No. S7–35–10]

RIN 3235–AK79

Security-Based Swap Data Repository Registration, Duties, and Core Principles

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: In accordance with Section 763(i) of Title VII ("Title VII") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), the Securities and Exchange Commission ("Commission") is proposing new rules under the Securities Exchange Act of 1934 ("Exchange Act") governing the security-based swap data repository ("SDR") registration process, duties, and core principles.

DATES: Comments should be submitted on or before January 24, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–53–10 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

All submissions should refer to File Number S7–53–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: John Ramsay, Deputy Director; Jo Anne Swindler, Assistant Director; Richard Vorosmarti, Special Counsel; Angie Le, Special Counsel; Miles Treakle, Staff Attorney; or Bradley Gude, Special Counsel, Division of Trading and Markets, at (202) 551–5777, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing Rules 13n–1 to 13n–11 under the Exchange Act governing SDRs. The Commission is soliciting comment on all aspects of the proposed rules and will carefully consider any comments received.

I. Introduction

On July 21, 2010, President Barack Obama signed the Dodd-Frank Act into law.[1] The Dodd-Frank Act was enacted to, among other things, promote the financial stability of the United States by improving accountability and transparency in the financial system.[2] Specifically, Title VII of the Dodd-Frank Act provides the Commission and the Commodity Futures Trading Commission ("CFTC") with the authority to regulate over-the-counter ("OTC") derivatives in light of the recent financial crisis, which demonstrated the need for enhanced regulation of the OTC derivatives market. The Dodd-Frank Act is intended to strengthen the existing regulatory structure and to provide the Commission and the CFTC with effective regulatory tools to oversee the OTC derivatives market, which has grown exponentially in recent years and is capable of affecting significant sectors of the U.S. economy.

The Dodd-Frank Act provides the CFTC with authority to regulate "swaps," the Commission with authority to regulate "security-based swaps" ("SBSs"), and both the CFTC and the Commission with authority to regulate "mixed swaps." [3] The Dodd-Frank Act amends the Exchange Act to require the following with respect to transactions in SBSs regulated by the Commission: (1) Transactions in SBSs must be cleared through a clearing agency if they are of a type that the Commission determines must be cleared, unless an exemption applies; [4] (2) if an SBS is subject to the clearing requirement, then it must be traded on a registered trading platform, *i.e.,* a security-based swap execution facility ("SB SEF") or SBS exchange, unless no facility makes such SBS available for trading; [5] and (3) transactions in SBSs (whether cleared or uncleared) must be reported to a registered SDR or the Commission.[6]

The Dodd-Frank Act provides the Commission with broad authority to adopt rules governing SDRs and to develop additional duties applicable to SDRs.[7] Today, the Commission is proposing in this release new Rules 13n–1 to 13n–11 under the Exchange Act governing SDR registration process, duties, and core principles, including duties related to data maintenance and access by relevant authorities and those seeking to use the SDR's repository services.[8] Pursuant to the legislation,

[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[2] *See* Public Law 111–203, Preamble.

[3] Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation with the Board of Governors of the Federal Reserve System ("Federal Reserve"), shall jointly further define the terms "swap," "security-based swap," "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," "eligible contract participant," and "security-based swap agreement." These terms are defined in Sections 721 and 761 of the Dodd-Frank Act and, with respect to the term "eligible contract participant," in Section 1a(18) of the Commodity Exchange Act ("CEA"), 7 U.S.C. 1a(18), as re-designated and amended by Section 721 of the Dodd-Frank Act. Further, Section 721(c) of the Dodd-Frank Act requires the CFTC to adopt a rule to further define the terms "swap," "swap dealer," "major swap participant," and "eligible contract participant," and Section 761(b) of the Dodd-Frank Act permits the Commission to adopt a rule to further define the terms "security-based swap," "security-based swap dealer," "major security-based swap participant," and "eligible contract participant," with regard to SBSs, for the purpose of including transactions and entities that have been structured to evade Title VII. Finally, Section 712(a) of the Dodd-Frank Act provides that the Commission and CFTC, after consultation with the Federal Reserve, shall jointly prescribe regulations regarding "mixed swaps," as may be necessary to carry out the purposes of Title VII. To assist the Commission and CFTC in further defining the terms specified above, and to prescribe regulations regarding "mixed swaps" as may be necessary to carry out the purposes of Title VII, the Commission and the CFTC are currently seeking comments from interested parties. *See* Exchange Act Release No. 62717 (Aug. 13, 2010), 75 FR 51429 (Aug. 20, 2010) (File No. S7–16–10) (advance joint notice of proposed rulemaking regarding definitions contained in Title VII).

[4] *See* Public Law 111–203, § 763(a) (adding Exchange Act Section 3C).

[5] *See* Public Law 111–203, § 763(c) (adding Exchange Act Section 3D).

[6] *See* Public Law 111–203, §§ 763(i) and 766(a) (adding Exchange Act Sections 13(m)(1)(G) and 13A(A)(1), respectively). The Dodd-Frank Act amends the CEA to provide for a similar regulatory framework with respect to transactions in swaps regulated by the CFTC.

[7] *See* Public Law 111–203, § 763(i) (adding Exchange Act Sections 13(n)(7)(D)(i) and 13(n)(9)).

[8] Section 712(a)(2) of the Dodd-Frank Act provides that, before commencing any rulemaking regarding SBSs, security-based swap dealers ("SBS dealers"), major security-based swap participants

SDRs are required to collect and maintain accurate SBS transaction data so that relevant authorities can access and analyze the data from secure, central locations to better monitor for systemic risk and potential market abuse.

A separate release issued by the Commission today proposes Regulation SBSR, which, among other things, implements the provisions of the Dodd-Frank Act for reporting SBS transactions to SDRs, including standards for the data elements that must be provided.[9] In addition, the Dodd-Frank Act requires the Commission to engage in rulemaking for the public dissemination of SBS transaction, volume, and pricing data,[10] and provides the Commission with discretion to determine an appropriate approach to implement this important function. In Regulation SBSR, the Commission proposes to require SDRs to undertake this role.[11]

Taken together, the rules that the Commission proposes today seek to provide improved transparency to regulators and the markets through comprehensive regulations for SBS transaction data and SDRs. The proposed rules would require SBS transaction information to be (1) provided to SDRs in accordance with uniform data standards; (2) verified and maintained by SDRs, which serve as secure, centralized recordkeeping facilities that are accessible by relevant authorities; and (3) publicly disseminated in a timely fashion by SDRs. In combination, these proposed rules represent a significant step forward in providing a regulatory framework that promotes transparency and efficiency in the OTC derivatives markets and creates important infrastructure to assist relevant authorities in performing their market oversight functions.

In preparation for the rulemakings related to SDRs, Commission and CFTC staff held a joint public roundtable (the "Data Roundtable") on September 14, 2010 to gain further insight into many of the issues addressed in this proposal.[12] The rules proposed today take into account the views expressed at the Data Roundtable, as well as the comments received.

This proposed rulemaking is among the first that the Commission has considered in connection with its mandates under the Dodd-Frank Act, and the Commission is mindful of the considerations raised by this timing. The Commission notes that the SBS market is in a nascent stage of regulatory development compared to the markets for equity securities and listed options and that the SBS market could develop further as the Dodd-Frank Act is fully implemented and these transactions move to central clearing and trading on organized markets. Accordingly, the Commission urges all interested parties to comment on all aspects of this proposed rulemaking, including whether this proposal, taken as a whole, appropriately advances the objectives of the Dodd-Frank Act in a manner that adequately takes into account the characteristics of the relevant markets.

II. Role, Regulation, and Business Models of SDRs

Under the Dodd-Frank Act, SDRs are intended to play a key role in enhancing transparency in the SBS market by retaining complete records of SBS transactions, maintaining the integrity of those records, and providing effective access to those records to relevant authorities and the public in line with their respective information needs. The enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration of risk exposures in the SBS market. Without an SDR, data on SBS transactions is dispersed and not readily available to regulators and others. SDRs may be especially critical during times of market turmoil, both by giving relevant authorities information to help limit systemic risk and by promoting stability through enhanced transparency. By enhancing stability in the SBS market, SDRs may also indirectly enhance stability across markets, including equities and bond markets.[13]

In addition, SDRs have the potential to reduce operational risk and enhance operational efficiency in the SBS market. By maintaining transaction records that are accessible by both counterparties to an SBS, SDRs will provide a mechanism for counterparties to ensure that their records reconcile on all of the key economic details, which may decrease the likelihood of disputes. The Dodd-Frank Act's requirement of having all SBSs reported to an SDR encourages standardization of data elements, which promotes operational and market efficiency.

The data maintained by an SDR may also assist regulators in (i) preventing market manipulation, fraud, and other market abuses; (ii) performing market surveillance, prudential supervision, and macroprudential (systemic risk) supervision; and (iii) resolving issues and positions after an institution fails.[14]

SDRs themselves are, however, subject to certain operational risks. The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the SBS market. Failure to maintain privacy of such data could lead to market abuse and subsequent loss of liquidity. Therefore, it is important that SDRs are well-run and effectively regulated.

("major SBS participants"), SDRs, SBS clearing agencies, persons associated with an SBS dealer or major SBS participant, eligible contract participants with regard to SBSs, or SB SEFs pursuant to Subtitle B of Title VII, the Commission must consult and coordinate with the CFTC and other prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible. *See* Public Law 111–203, § 712(a)(2). Any person that is required to be registered as an SDR under Exchange Act Section 13(n) must register with the Commission, regardless of whether that person is also registered under the CEA as a swap data repository. Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(8)). The Commission preliminarily believes that an entity that registers with the Commission as an SDR is likely to register also with the CFTC as a swap data repository. As a result, the Commission staff and the CFTC staff have consulted and coordinated with one another regarding their respective Commissions' proposed rules regarding SDRs and swap data repositories as mandated by Sections 763 and 728 of the Dodd-Frank Act, respectively. The Commission staff has also consulted and coordinated with other prudential regulators.

[9] *See* Exchange Act Release No. 63346 (Nov. 19, 2010) ("Regulation SBSR Release").

[10] Public Law 111–203, § 763(i) (adding Exchange Act Section 13(m)(1)).

[11] *See* Regulation SBSR Release, *supra* note 9.

[12] The Commission and the CFTC solicited comments on the Data Roundtable. *See* Exchange Act Release No. 62863 (Sept. 8, 2010), 75 FR 55575 (Sept. 13, 2010). Comments received by the Commission are available at *http://www.sec.gov/cgi-bin/ruling-comments?ruling=df-title-vii-swap-data-repositories&rule_path=/comments/df-title-vii/swap-data-repositories&file_num=DF%20Title%20VII%20-%20Swap%20Data%20Repositories&action=Show_Form&title=Swap%20Data%20Repositories%20-%20Title%20VII%20Provisions%20of%20the%20Dodd-Frank%20Wall%20Street%20Reform%20and%20Consumer%20Protection%20Act.*

[13] *See* Darrell Duffie, Ada Li, and Theo Lubke, *Policy Perspectives of OTC Derivatives Market Infrastructure,* Federal Reserve Bank of New York Staff Report No. 424, dated January 2010, as revised March 2010 ("Transparency can have a calming influence on trading patterns at the onset of a potential financial crisis, and thus act as a source of market stability to a wider range of markets, including those for equities and bonds.").

[14] *See* Letter from DTCC to Chairmen Mary Schapiro and Gary Gensler (Nov. 15, 2010) (*available at http://www.sec.gov/comments/df-title-vii/swap-data-repositories/swapdatarepositories-13.pdf*) ("A registered SDR should be able to provide (i) enforcement agents with necessary information on trading activity; (ii) regulatory agencies with counterparty-specific information about systemic risk based on trading activity; (iii) aggregate trade information for publication on market-wide activity; and (iv) a framework for real-time reporting from swap execution facilities and derivatives clearinghouses.")

The Commission is cognizant that the proposed rules discussed herein, as well as other proposals that the Commission may consider in the coming months to implement the Dodd-Frank Act, if adopted, could significantly affect—and be significantly affected by—the nature and scope of the SBS market in a number of ways. For example, the Commission recognizes that if the measures that are adopted are too onerous for new entrants, they could discourage competition and formation of SDRs. On the other hand, if the Commission adopts rules that are too permissive, SDRs might be prone to deficiencies such as limited access to their services or potential lack of data integrity. The Commission is also mindful that further development of the SBS market may alter the calculus for future regulation of SDRs. As commenters review this release, they are urged to consider generally the role that regulation may play in fostering or limiting development of the SBS market (or, vice versa, the role that market developments may play in changing the nature and implications of regulation) and to focus specifically on this issue with respect to the proposals regarding SDRs that are discussed below.

The Commission is also aware that the regulatory framework for SDRs being developed by the Commission must take into account the commercial viability of SDRs, because realizing the benefits of SDRs requires that entities seek to engage in the business of being an SDR. In this regard, the Commission, which has limited experience with data repositories, seeks to understand the potential revenue streams and operating costs for SDRs. Based on our understanding of existing data repositories and discussions with industry representatives, it appears that SDRs might operate under any one of a number of business models. For example, an SDR could provide basic services and access to data on an at-cost utility model basis. Alternatively, an SDR might seek to earn a profit from fees charged to participants for reporting SBS transaction data to the SDR or for providing raw data to participants or others. In either of these two models, the SDR could also offer to participants additional or ancilliary services related to the SBS data that is reported to the SDR, such as calculating quarterly coupon and other payments (*e.g.,* upfront fees or credit event payments) due between counterparties of an SBS; providing bilateral netting calculations; and providing automated life cycle processing for successor events such as reorganizations and renaming of corporate entities, and credit events such as bankruptcies, restructurings, and insolvencies. Further, an entity that already offers post-trade processing or matching and confirmation services might seek to expand its business to include acting as a data repository. Finally, any of these models could involve the sale of enhanced data or tools derived from the use and analysis of data reported to the repository.

The SDR regulatory regime set forth in the Dodd-Frank Act and any rules that the Commission may adopt to implement the Act will likely affect an entity's decision over which business model to adopt. An entity likely will remain in or enter into the SBS market as a registered SDR based upon the interplay between the business model that it selects and the regulatory requirements that the Commission imposes under the Dodd-Frank Act.

The Commission recognizes the importance of promoting the development of SDRs to collect, maintain, and make available accurate SBS data to relevant authorities and the public. The rules that the Commission proposes in this release today reflect its preliminary views on potentially appropriate regulatory requirements to implement the Dodd-Frank Act with respect to SDRs. In this regard, the Commission has considered its experience in regulating the securities market and has sought to propose rules that take into account the obligations the Commission has imposed on other registrants.[15] At the same time, the Commission is interested in gathering additional information regarding the business models that the industry may utilize to operate registered SDRs, views on the potential areas of competition among SDRs, and the interplay between the commercial viability of various SDR business models and any rules implemented under the Dodd-Frank Act. The Commission does not intend by the requirements imposed on an SDR to mandate any particular business model, and it solicits comment on the effect of the proposed rules on business models that SDRs would adopt, and the consequences for market integrity, transparency, and efficiency.

Request for Comment

The Commission also requests comment on the following specific issues:

- Are there business models other than those described above that an SDR may want to adopt? What are the business models, and what are their benefits and drawbacks for SDRs and for the integrity, transparency, and efficiency of the SBS market?
- Do the Commission's proposed rules favor or discourage one business model over another? If so, identify which rule(s) and explain.
- Should the Commission's rules favor or discourage one business model over another? If so, which models should be favored or discouraged and why?
- What factors determine whether an entity decides to operate as an SDR?
- Who are the likely investors in or sources of capital for new SDRs? What are the key sources of risk or uncertainty facing such persons? How would the rules being proposed by the Commission, taken as a whole or individually, facilitate or discourage the investment of capital in SDRs?
- What are the revenue sources available to SDRs? How would the rules proposed or that may be adopted affect potential revenue sources for SDRs, and their commercial viability? Could repositories be commercially viable if the only permissible sources of revenue derived from receiving and generating and providing aggregated data? Which revenue sources are expected to be most important from the standpoint of commercial viability?
- Would there be advantages or disadvantages to the market if SDRs were required to provide basic services on an at-cost or utility model basis?
- Do the rules proposed by the Commission in this release, taken as a whole, reflect an appropriate regulatory burden on SDRs, considering the statutory mandates and policy goals of the Dodd-Frank Act? Should the Commission impose additional or fewer requirements on SDRs? Which

[15] For example, proposed Rule 13n-6 would require SDRs to comply with obligations related to their automated systems' capacity, resiliency, and security that are comparable to the standards applicable to self-regulatory organizations, including clearing agencies, and other registrants pursuant to the Commission's Automation Review Policy standards. And, the requirement in proposed Rule 13n-4 for an SDR to ensure that any dues, fees, or any other charges imposed by, and any discounts or rebates offered by, an SDR be fair and reasonable and not unreasonably discriminatory is similar to obligations imposed by the Exchange Act on other registrants. *See, e.g.,* Exchange Act Section 6(b)(4) ("The rules of the exchange [shall] provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities"); Exchange Act Section 17A(b)(3)(D) ("The rules of the clearing agency [shall] provide for the equitable allocation of reasonable dues, fees and other charges among its participants"); *see also* Exchange Act Sections 11A(c)(1)(C) and (D) (providing that the Commission may prescribe rules to assure that all securities information processors ("SIPs") may, "for purposes of distribution and publication, obtain on fair and reasonable terms such information" and to assure that "all other persons may obtain on terms which are not unreasonably discriminatory" the transaction information published or distributed by SIPs).

requirements should be added or removed and why? Which requirements, if any, in combination or alone, would be unduly burdensome on SDRs?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in these rules? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement these proposed rules?

• How many SDRs are likely to register with the Commission? Will there likely be more than one SDR for each asset class of SBSs? If there will likely be only one SDR for each asset class, will that be due to the inherent nature of the market and of the SDR business model; will that be due to the rules proposed by the Commission; or will that be due to other factors? Should the Commission impose additional regulatory requirements to mitigate any potential detrimental impact on the SBS market related to a single, dominant SDR for each asset class? Or should the Commission instead seek to encourage more competition among SDRs by modifying or eliminating certain aspects of its proposed rules to facilitate new entrants into the market?

• Exchange Act Section 13(n)(5) requires an SDR to "provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity)." Under this provision, should the Commission designate one SDR as the recipient of the information of other SDRs, through direct electronic access to the SBS data at the other SDRs, in order to provide the Commission and relevant authorities with a consolidated location for SBS data? If so, should the consolidation of data from SDRs be by asset class of SBSs or across all asset classes? What would be the costs and benefits of requiring SDRs to report transaction data to another registered SDR that would consolidate the information? If the Commission were to designate one SDR to be the consolidator of SBS data in an asset class or for all SBS data, are there requirements that should be imposed on such an entity that are different than those imposed on other SDRs? Are there specific criteria that the Commission should consider in selecting an SDR to be a consolidator of SBS data?

III. Discussion of Proposed Rules Governing SDRs

Exchange Act Section 3(a)(75), enacted in Section 761 of the Dodd-Frank Act, defines a "security-based swap data repository" to mean "any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps." [16] Exchange Act Section 13(n), enacted in Section 763(i) of the Dodd-Frank Act, makes it "unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository." [17] To be registered and maintain such registration, each SDR is required to comply with the requirements and core principles described in Exchange Act Section 13(n), as well as with any requirements that the Commission adopts by rule or regulation.[18] The Dodd-Frank Act also requires each SDR to appoint a chief compliance officer ("CCO") and specifies the CCO's duties.[19] In addition, the Dodd-Frank Act grants the Commission authority to inspect and examine any registered SDR and to prescribe data standards for SDRs.[20]

A. Proposed Rule Regarding Registration of SDRs [21]

The Commission is proposing Rule 13n–1, which establishes the procedures by which an SDR may apply to the Commission for registration. The proposed rule would provide that an application for the registration of an SDR must be filed electronically in a tagged [22] data format on proposed new Form SDR with the Commission in accordance with the instructions contained in the form.[23] The Commission anticipates developing an online filing system through which an SDR would be able to file and update Form SDR.[24] The information filed would be available on the Commission's Web site.[25] The Commission preliminarily believes that filing Form SDR in an electronic format would be less burdensome and more efficient for both the SDRs and the Commission.

As part of the Commission's longstanding efforts to increase transparency and the usefulness of information, the Commission has been implementing data-tagging of information contained in electronic filings to improve the accuracy of financial information and facilitate its analysis.[26] Data becomes machine-readable when it is labeled, or tagged, using a computer markup language that can be processed by software programs for analysis. Such computer markup languages use standard sets of definitions, or "taxonomies," that translate text-based information in

[16] Public Law 111–203, § 761 (adding Exchange Act Section 3(a)(75)).

[17] Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(1)). Any person that is required to be registered as an SDR under Exchange Act Section 13(n) must register with the Commission, regardless of whether that person is also registered under the CEA as a swap data repository. *Id.* (adding Exchange Act Section 13(n)(8)). Under the legislation, a clearing agency may register as an SDR. *Id.* (adding Exchange Act Section 13(m)(1)(H)). In addition, any person that is required to register as an SDR pursuant to this section must register with the Commission regardless of whether that person is also registered as an SB SEF.

[18] *See id.* (adding Exchange Act Section 13(n)(3)).

[19] *See id.* (adding Exchange Act Section 13(n)(6)).

[20] *See id.* (adding Exchange Act Sections 13(n)(2) and 13(n)(4)). In a separate proposal, the Commission is proposing rules prescribing the data elements that an SDR is required to accept for each SBS in association with requirements under Section 763(i), adding Exchange Act Section 13(n)(4)(A) relating to standard setting and data identification. *See* Regulation SBSR Release (proposed Rule 901), *supra* note 9. Any comments regarding the data elements should be submitted in connection with that proposal.

[21] In separate proposals, the Commission is proposing rules requiring each SDR to register as a SIP, as defined in Exchange Act Section 3(a)(22), on Form SIP based on additional requirements proposed in those rules and to register as a clearing agency, depending on an SDR's services. *See, e.g.,* Regulation SBSR Release (proposed Rule 909), *supra* note 9. Any comments regarding such registrations should be submitted in connection with these proposals.

[22] The term "tag" (including the term "tagged") would be defined as an identifier that highlights specific information submitted to the Commission that is in the format required by the Electronic Data Gathering, Analysis, and Retrieval System ("EDGAR") Filer Manual, as described in Rule 301 of Regulation S–T. *See* proposed Rule 13n–1(a)(3); *see also* 17 CFR 232.301. The term "EDGAR Filer Manual" would have the same meaning as set forth in Rule 11 of Regulation S–T (defining "EDGAR Filer Manual" as "the current version of the manual prepared by the Commission setting out the technical format requirements for an electronic submission"). *See* Proposed Rule 13n–1(a)(1); *see also* 17 CFR 232.11.

[23] *See* proposed Rule 13n–1(b).

[24] The Commission anticipates that SDR filings will be submitted through EDGAR, in which case the electronic filing requirements of Regulation S–T would apply. *See generally* 17 CFR 232 (governing the electronic submission of documents filed with the Commission).

[25] If the Commission adopts the rule as proposed, it is possible that SDRs might be required to file Form SDR in paper until such time as an electronic filing system is operational and capable of receiving the form. SDRs would be notified as soon as the electronic system can accept filing of Form SDR. At such time, the Commission may require each SDR to promptly re-file electronically Form SDR and any amendments to the form.

[26] *See* Regulation S–T, 17 CFR 232. *See also* Securities Act Release No. 8891 (Feb. 6, 2008), 73 FR 10592 (Feb. 27, 2008); Securities Act Release No. 9002 (Jan. 30, 2009), 74 FR 6776 (Feb. 10, 2009); Securities Act Release No. 9006 (Feb. 11, 2009), 74 FR 7748 (Feb. 19, 2009); Exchange Act Release No. 61050 (Nov. 23, 2009), 74 FR 63832 (Dec. 4, 2009); Investment Company Release No. 29132 (Feb. 23, 2010), 75 FR 10060 (Mar. 4, 2010).

Commission filings into structured data that can be retrieved, searched, and analyzed through automated means. Requiring the information to be tagged in a machine-readable format using a data standard that is freely available, consistent, and compatible with the tagged data formats already in use for Commission filings would enable the Commission to review and analyze effectively Form SDR submissions.

1. Proposed New Form SDR

Proposed Form SDR includes a set of instructions for its proper completion and submission. These instructions are attached to this release, together with proposed Form SDR. The instructions would require an SDR to indicate the purpose for which it is submitting the form (*i.e.,* application for registration, or amendment to an application or to an effective registration) and then to provide information in seven categories: (1) General information, (2) business organization, (3) financial information, (4) operational capability, (5) access to services and data, (6) other policies and procedures, and (7) legal opinion. As part of the application process, each SDR would be required to provide additional information to the Commission upon request.[27]

The Commission preliminarily believes that permitting an SDR to provide information in narrative form would allow the SDR greater flexibility and opportunity for meaningful disclosure of relevant information. The Commission also preliminarily believes that it is necessary to obtain the requested information in proposed Form SDR to enable the Commission to determine whether to grant or deny an application for registration. Specifically, the information would assist the Commission in understanding the basis for registration as well as an SDR's overall business structure, financial condition, track record in providing access to its services and data, technological reliability, and policies and procedures to comply with its statutory obligations. The information would also be useful to the Commission in tailoring any requests for additional information that it may ask an SDR to provide. Furthermore, the required information would assist the Commission in the preparation of its inspection and examination of an SDR.

General Information. Proposed Form SDR would require an SDR to provide contact information, information concerning successor entities (if applicable), a list of asset classes of SBSs for which the SDR is collecting and maintaining data or for which it proposes to collect and maintain data, and a description of the functions that it performs or proposes to perform. This information would assist the Commission and its staff in evaluating the applications and overseeing registered SDRs.

An SDR would be required to consent that any notice or service of process, pleadings, or other documents in connection with any action or proceeding against the SDR may be effectuated by certified mail to an officer or person specified by the SDR at a given U.S. address. The Commission preliminarily believes that this consent is important to minimize any logistical obstacles (*e.g.,* locating defendants or respondents abroad) that the Commission may encounter when attempting to provide notice to an SDR or to effect service, including service overseas.

Form SDR must be signed by a person who is duly authorized to act on behalf of the SDR. The signer would be required to certify that all information contained in the application, including the required items and exhibits, is true, current, and complete. This certification is consistent with the certification provisions in the registration forms for SIPs, investment advisers, and broker-dealers (*i.e.,* Forms SIP, ADV, and BD).[28]

If an applicant is a non-resident SDR, then the signer of Form SDR would also be required to certify that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission.[29] For purposes of the certification, the term "non-resident security-based swap data repository" would mean (i) in the case of an individual, one who resides in or has his principal place of business in any place not in the United States; (ii) in the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or (iii) in the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.[30] Certain foreign jurisdictions may have laws that complicate the ability of financial institutions such as SDRs located in their jurisdictions from sharing and/or transferring certain information, including personal financial data of individuals that the financial institutions come to possess from third persons (*e.g.,* personal data relating to the identity of market participants or their customers). The Commission preliminarily believes that the non-resident SDR certification is important to confirm that each SDR located overseas has taken the necessary steps to be in the position to provide the Commission with prompt access to its books and records and to be subject to onsite inspection and examination by the Commission. Failure to make this certification may be a basis for the Commission to deny an application for registration. If a registered non-resident SDR becomes unable to comply with this certification, then this may be a basis for the Commission to revoke the SDR's registration.

Business Organization. Proposed Form SDR would require each SDR to provide information regarding its business organization, including information about (1) any person who owns 10 percent or more of the SDR's stock or who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the SDR's management or policies, (2) the business experience, qualifications, and disciplinary history of its designated CCOs, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees,[31] (3) its

[27] *See* proposed Rule 13n–1(b).

[28] *See* 17 CFR 249.1001 (Form SIP, for application for registration as a securities information processor or to amend such an application or registration); Form ADV (*available at http://www.sec.gov/about/forms/formadv.pdf*); and Form BD (*available at http://www.sec.gov/about/forms/formbd.pdf*).

[29] Under Exchange Act Section 13(n)(2), an SDR is subject to inspection and examination by the Commission. *See* Public Law 111–203, § 763(i).

[30] *See also* proposed Rule 13n–1(a)(2). This definition is substantially similar to the definition of "non-resident broker or dealer" in Exchange Act Rule 17a–7(d)(3). *See* 17 CFR 240.17a–7(d)(3).

[31] More specifically, proposed Form SDR would require an SDR to disclose the following information regarding its designated CCOs, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees: (a) Name, (b) title, (c) date of commencement and, if appropriate, termination of present term of position, (d) length of time such person has held the same position, (e) brief account of the business experience of such person over the last five years, (f) any other business affiliations in the securities industry or OTC derivatives industry, and (g) a description of: (1) Any order of the Commission with respect to such person pursuant to Exchange Act Sections 15(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3); (2) any conviction or injunction of a type described in Exchange Act Sections 15(b)(4)(B) or (C) within the past ten years; (3) any action of a self-regulatory organization with respect to such person imposing a final disciplinary sanction pursuant to Exchange Act Sections 6(b)(6), 15A(b)(7), or 17A(b)(3)(G); (4) any final action by a self-regulatory organization with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by, such organization of

governance arrangements, (4) the SDR's constitution, articles of incorporation or association with all amendments to them, existing by-laws, rules, procedures, and instruments corresponding to them, (5) the SDR's organizational structure, (6) its affiliates,[32] (7) any material pending legal proceedings to which the SDR or its affiliate is a party or to which any of its property is the subject, (8) the SDR's material contracts with any SB SEF, clearing agency, central counterparty, and third party service provider, and (9) the SDR's policies and procedures to minimize conflicts of interest in its decision-making process and to resolve any such conflicts of interest. Obtaining this information would assist the Commission in understanding an SDR's overall business structure, governance arrangements, and operations, all of which would assist the Commission in its inspection and examination of the SDR.

Financial Information. Each SDR would be required to disclose as exhibits to proposed Form SDR certain financial and related information, including (1) its balance sheet, statement of income and expenses, statement of sources and application of revenues, and all notes or schedules thereto, as of the most recent fiscal year of the SDR, or, alternatively, a financial report, as discussed further in Section III.K.3 of this release, (2) a balance sheet and statement of income and expense for each affiliate of the SDR as of the end of the most recent fiscal year of each such affiliate, or, alternatively, identification of the most recently filed annual report on Form 10–K of the SDR's affiliate, if available, (3) the SDR's schedule of dues, fees, and other charges imposed, or to be imposed, for its services as well as any discounts and rebates offered, or to be offered, and (4) a description of any differentiations in such dues, fees, other charges, discounts, and rebates.

Operational Capability. Proposed Form SDR would also require each SDR to provide information on its operational capability, including (1) its functions and services, (2) the computer hardware that it uses to perform its functions, (3) personnel qualifications for each category of professional, non-professional, and supervisory employees employed by the SDR or the division, subdivision, or other segregable entity within the SDR, (4) the SDR's measures or procedures to provide for the security of any system employed to perform its functions, including any physical and operational safeguards designed to prevent unauthorized access to the system, (5) any circumstances within the past year in which such security measures or safeguards failed to prevent any such unauthorized access to the system and any measures taken to prevent a reoccurrence, (6) any measures used to satisfy itself that the information received or disseminated by the system is accurate, (7) the SDR's backup systems or subsystems that are designed to prevent interruptions in the performance of any SDR functions, (8) limitations on the SDR's capacity to receive (or collect), process, store, or display its data and factors that account for such limitations, and (9) the priorities of assignment of capacity between functions of the SDR and any other uses and methods used to divert capacity between such functions and other uses. Obtaining this information would assist the Commission in determining, among other things, whether an SDR is able to comply with proposed Rule 13n–6, as discussed further in Section III.F of this release.

Access to Services and Data. Proposed Form SDR would further require an SDR to provide information regarding access to its services and data, including (1) the number of persons who presently subscribe, or who have notified the SDR of their intention to subscribe, to its services, (2) instances in which the SDR has prohibited or limited any person with respect to access to services offered or data maintained by the SDR,[33] (3) the storage media of any service furnished in machine-readable form and the data elements of such service, (4) copies of the contracts governing the terms by which persons may subscribe to the SDR's services, including ancillary services, (5) any specifications, qualifications, and criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any services offered or data maintained by the SDR, (6) any specifications, qualifications, or other criteria required of persons who supply SBS information to the SDR for collection and maintenance or of persons who seek to connect to or link with the SDR, (7) any specifications, qualifications, or other criteria required of any person who requests access to data maintained by the SDR, and (8) the SDR's policies and procedures to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the SDR and to determine whether any person who has been denied access has been discriminated against unfairly. Obtaining this information would assist the Commission in determining, among other things, whether an SDR can comply with proposed Rule 13n–4(c)(1), as discussed further in Section III.D.2.a in this release.

Other Policies and Procedures. Proposed Form SDR would require each SDR to submit as exhibits: (1) The SDR's policies and procedures to protect the privacy of any and all SBS transaction information that the SDR receives from a market participant or any registered entity, (2) a description of the SDR's safeguards, policies, and procedures to prevent the misappropriation or misuse of (a) any confidential information received by the SDR, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers; (b) material, nonpublic information; and/or (c) intellectual property by the SDR or any person associated with the SDR for their personal benefit or for the benefit of others, (3) the SDR's policies and procedures regarding its use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person for non-commercial and/or commercial purposes, (4) the SDR's procedures and a description of its facilities for resolving disputes over the accuracy of the transaction data and positions that are recorded in the SDR, (5) the SDR's policies and procedures relating to its calculation of positions, (6) the SDR's policies and procedures to prevent any provision in a valid SBS from being invalidated or modified through the

a member thereof; and (5) any final action by another federal regulatory agency, including the CFTC, any state regulatory agency, or any foreign financial regulatory authority resulting in: (i) A finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical; (ii) a finding that such person has been involved in a violation of any securities-related regulations or statutes; (iii) a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted; (iv) an order entered, in the past ten years, against such person in connection with a securities-related activity; or (v) any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related business or a restriction of such person's activities.

[32] For purposes of proposed Form SDR, an "affiliate" of an SDR would be defined as a person that, directly or indirectly, controls, is controlled by, or is under common control with the SDR. *See also* proposed Rule 13n–4(a)(1). This proposed definition of "affiliate" is designed to allow the Commission to collect comprehensive identifying information relating to an SDR.

[33] If the Commission adopts proposed Rule 909 of Regulation SBSR, which would require each SDR to register as a SIP, then Exchange Act Section 11A(b)(5) would govern denials of access to all SDRs' services. *See* Regulation SBSR Release (proposed Rule 909), *supra* note 9.

procedures or operations of the SDR, and (7) a plan to ensure that the transaction data and position data that are recorded in the SDR continue to be maintained after the SDR withdraws from registration, which shall include procedures for transferring transaction data and position data to the Commission or its designee (including another registered SDR). As discussed further below, the Commission is proposing to require each SDR to establish, maintain, and enforce these seven policies and procedures. In addition, an SDR would be required to submit as exhibits to Form SDR all of the policies and procedures set forth in Regulation SBSR.[34]

Legal Opinion. Finally, Form SDR would require each non-resident SDR to provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the books and records of such SDR and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission. Each jurisdiction may have a different legal framework with respect to its laws (*e.g.,* privacy laws) that may limit or restrict the Commission's ability to receive information from an SDR. Providing an opinion of counsel that an SDR can provide prompt access to books and records and can be subject to onsite inspection and examination will allow the Commission to better evaluate an SDR's ability to meet the requirements of registration and ongoing supervision. Failure to provide an opinion of counsel may be a basis for the Commission to deny an application for registration.

Request for Comment

The Commission requests comment on the following specific issues:

- Are the instructions in proposed Form SDR sufficiently clear? If not, identify any instructions that should be clarified and, if possible, offer alternatives.
- Are the Commission's proposed definitions of "affiliate," "non-resident security-based swap data repository," and "tag" appropriate and sufficiently clear? If not, why not and how should they be defined?
- Should the Commission implement an electronic filing system for receipt of Form SDR, and, if so, what particular features should be incorporated into the system?
- Do SDRs anticipate any burdens of filing Form SDR electronically that the Commission should consider?
- In the event that there is a delay in the full implementation of the Commission's electronic filing system for receiving Form SDR, should the Commission require each SDR to promptly re-file electronically Form SDR and any amendments to the form after the system is operational? If so, what would be a reasonable timeframe to allow such re-filing (*e.g.,* 30 days, 60 days)? Would the re-filing be unduly burdensome for SDRs?
- Which information in Form SDR, including exhibits, should be subject to the proposed data tagging requirements?
- Regarding the format of tagged data, as discussed in Section III.K.3 of this release, the Commission is proposing that an SDR's financial reports be submitted in eXtensible Business Reporting Language ("XBRL") format. Should the Commission require a specific format for tagging other information in proposed Form SDR (*e.g.,* financial information that is not a financial report as described in proposed Rule 13n–11(f), operational capability, access to services and data, and other policies and procedures)? If so, which format (*e.g.,* XML, XBRL) would be best suited to such information?
- Would it be useful for the Commission to provide any additional instructions or define any additional terms in proposed Form SDR? If so, what are they?
- Is the consent relating to notice and service of process on proposed Form SDR appropriate and sufficiently clear? If not, why not and what would be a better alternative to obtaining such consent?
- Are there other factors that the Commission should consider, in addition to an opinion of counsel, that address whether the Commission can legally, under applicable foreign law, obtain prompt access to an SDR's books and records and conduct onsite inspection or examination of the SDR?
- Are the representations that would be required to be made by the person who signs Form SDR appropriate and sufficiently clear? Should the Commission require any additional or alternative representations?
- Should the Commission require SDRs to provide information on persons who own ten percent or more of the SDR's stock or who may control or direct the management or policies of the SDR? Would a different ownership or control threshold be more appropriate? If so, why?
- Are the suggested timeframes of the business experience, qualifications, and disciplinary history of an SDR's designated CCOs, officers, directors, governors, and persons performing functions similar to any of the foregoing, and members of all standing committees appropriate? If not, what should the timeframes be?
- Should the suggested timeframe relating to any conviction or injunction of a type described in Exchange Act Sections 15(b)(4)(B) or (C) be ten years as proposed? If not, should it be longer, shorter, or indefinite? Should it be consistent with other forms (*e.g.,* Form BD) or with Section 15(b)(4)(B) itself?
- Is the financial information that the Commission is requesting on proposed Form SDR appropriate? If not, identify any items that are not appropriate, explain why, and, if possible, offer alternatives. For example, should the Commission request financial information of all affiliates of an SDR or only specific affiliates (*e.g.,* an SDR's parent company, an SDR's wholly-owned subsidiaries, entities in which an SDR has at least a 25% interest, entities that have at least a 25% interest in the SDR)?
- Is the information relating to an SDR's operational capability that the Commission is requesting on proposed Form SDR appropriate? If not, identify any items that are not appropriate, explain why, and, if possible, offer alternatives.
- Should the Commission require on Form SDR a narrative description of any interruption in an SDR's functions performed by automated facilities or systems that has lasted for more than thirty minutes within the preceding six months of filing Form SDR, including the date of each interruption, the cause and duration of each interruption, and the total number of interruptions that have lasted thirty minutes or less? If not, why not? Should the timeframes be longer or shorter? Would this request be necessary in light of the Commission's proposed Rule 13n–6(b)(3)'s requirement that an SDR notify the Commission in writing of material systems outages, as discussed further in Section III.F.1.c. of this release?
- Is the information relating to access to an SDR's services and data that the Commission is requesting on proposed Form SDR appropriate? If not, identify any items that are not appropriate, explain why, and, if possible, offer alternatives.
- Is the Commission's request for information on the specified policies and procedures of an SDR appropriate? If not, explain.
- Would any of the requested information on proposed Form SDR be difficult for an SDR to supply? If so, explain.
- Should the Commission require any additional information on proposed

[34] *See* Regulation SBSR Release, *supra* note 9.

Form SDR? If so, what information and why?

• Are there any items on proposed Form SDR that the Commission should not request? If so, which items and why?

• Under proposed Regulation SBSR, an SDR would be required to register with the Commission as a SIP on Form SIP.[35] Should the Commission combine Form SDR and Form SIP such that an SDR would register as an SDR and SIP using only one form? For example, should the Commission add item 28c from Form SIP to Form SDR? Are there other items from Form SIP that should be added to Form SDR that would help facilitate the registration process?

• Should the policies and procedures required under proposed Regulation SBSR be filed with the Commission as exhibits to Form SDR or attachments to a separate schedule to Form SDR?

• What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

2. *Factors for Approval of Registration and Procedural Process for Review*

Proposed Rule 13n–1(c) would provide that within 90 days of the date of the filing of Form SDR (or within such longer period as to which the SDR consents), the Commission shall either grant the registration by order or institute proceedings to determine whether registration should be denied. The 90-day period would not begin to run until a complete Form SDR has been filed by an SDR with the Commission. Proceedings instituted pursuant to this proposed rule shall include notice of the grounds for denial under consideration and opportunity for hearing on the record and shall be concluded not later than 180 days after the date on which the application for registration is filed with the Commission under proposed Rule 13n–1(b).[36] At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration.[37] The Commission may extend the time for conclusion of such proceedings for up to 90 days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the SDR consents.[38]

The proposed rule would further provide that the Commission shall grant the registration of an SDR if the Commission finds that such SDR is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as an SDR, comply with any applicable provision of the Federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Exchange Act Section 13(n) and the rules and regulations thereunder.[39] The Commission shall deny the registration of an SDR if the Commission does not make any such finding.[40]

The Commission preliminarily believes that its proposed timeframes for reviewing applications for registration as an SDR are appropriate to allow the Commission staff sufficient time to ask questions and, as needed, to require amendments or changes to address legal or regulatory concerns before the Commission approves an application for registration. In addition, the registration provides a mechanism for an SDR to demonstrate that it can comply with the federal securities laws and the rules and regulations thereunder. The proposed procedural process for reviewing applications for registration as an SDR is consistent with the procedural process for reviewing applications of other registrants by the Commission (*e.g.,* SIPs, broker-dealers, nationally recognized statistical ratings organizations, national securities exchanges, registered securities associations, clearing agencies) although the timeframes for review vary.[41]

In order to form a more complete and informed basis on which to determine whether to grant, deny, or revoke an SDR's registration, the Commission is considering whether to adopt a requirement that an SDR file with the Commission, as a condition of registration or continued registration, a review relating to the SDR's operational capacity and ability to meet its regulatory obligations. The Commission could require such a review to be in the form of a report conducted by the SDR, an independent third party, or both. This review could be required as an exhibit to Form SDR at the time of registration or as an amendment to Form SDR at a later date (*e.g.,* one year after the registration becomes effective) to allow the review to evaluate the SDR's capabilities after some operational experience following registration.

Request for Comment

The Commission requests comment on the following specific issues:

• Is the Commission's proposed registration process appropriate and sufficiently clear? If not, why not and what would be a better alternative?

• Are the timeframes in the proposed registration process appropriate? If not, why not and what would be more appropriate timeframes?

• Are the proposed factors in determining whether the Commission should grant or deny an application for registration appropriate and sufficiently clear? If not, why not? Should the Commission take into consideration any other factors in determining whether to grant or deny an SDR's application for registration?

• If a non-resident SDR is registered as an SDR in a foreign jurisdiction, should the registration process for the non-resident SDR be any different than the Commission's proposed registration process? For example, should the registration process be more streamlined for such non-resident SDR? Should the process instead require more information from a non-resident SDR? What would be the reasons to provide for a different registration process or, on the other hand, to require a uniform process?

• Should the Commission consider any other factors relating to a non-resident SDR with respect to the Commission's registration rules or in general?

• What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

• Should the Commission require an SDR to conduct or obtain a review relating to the SDR's operational capacity and ability to meet its regulatory obligations? If not, why not? If so, how should the Commission define the nature and scope of this review? Should the Commission identify a specific framework for SDRs or independent third parties to follow when conducting a review? If so, what would the critical components of the framework include? Are existing frameworks available that are suitable for this purpose and, if so, which ones would be considered appropriate? Should the review resemble a report, audit, or something else?

• Should the Commission require the SDR, an independent third party, or some other entity to conduct the review? What are examples of such a review? Should the Commission require a review on a case-by-case basis or for

[35] *See* Regulation SBSR Release (proposed Rule 909), *supra* note 9.

[36] Proposed Rule 13n–1(c).

[37] *Id.*

[38] *Id.*

[39] Proposed Rule 13n–1(c)(3).

[40] *Id.*

[41] *See* 15 U.S.C. 78k–1(b)(3), 78o(b), 78o–7(2), and 78s(a).

all SDRs? Should the Commission require that the review be filed with the Commission? If not, why not? If so, should it be required to be filed with the Commission as a condition of registration pursuant to proposed Rule 13n–1? If not, why not? When should the Commission require the filing of any review? Would conducting or obtaining a review, or filing such review with the Commission, impose impracticable burdens and costs on SDRs? Please explain the burdens and quantify the costs of such a review.

• If the Commission were to adopt a rule requiring a review by an independent third party, should the rule specify some minimum standard of review or the types of review that should be performed? If so, what should the standards be? Should there be minimum qualification standards for the independent third party? Are there any particular types of third party service providers that should not be permitted to conduct a review of an SDR?

• Should the Commission also require that an SDR certify the accuracy of the review and provide disclosure regarding the nature of the review, findings, and conclusions? To what extent should an SDR be permitted to rely on a third party that it hired to perform the review? Should the Commission condition the ability of an SDR to rely on a third party's review?

• Would a review by an independent third party be necessary in light of the CCO's annual compliance report or proposed Rule 13n–6, as discussed further below?

3. *Temporary Registration*

Proposed Rule 13n–1(d) would provide a method for SDRs to register temporarily with the Commission. Specifically, the Commission, upon the request of an SDR, may grant temporary registration of the SDR that shall expire on the earlier of: (1) The date that the Commission grants or denies registration of the SDR, or (2) the date that the Commission rescinds the temporary registration of the SDR.[42] The reasons that the Commission may rescind such temporary registration would be the same as those set forth in proposed Rule 13n–2(c), discussed below, for revoking or cancelling a registration of an SDR—*e.g.,* if the Commission finds that an SDR has made any false and misleading statements with respect to any material fact on its Form SDR, is no longer in existence, has ceased to do business in the capacity specified in its application for registration, or has violated or failed to comply with any provision of the federal securities laws or the rules or regulations thereunder. In addition, the Commission would expect that SDRs registered on a temporary registration basis demonstrate that they have the capacity and resources to comply with their regulatory obligations on an ongoing basis as their business evolves.

The proposed temporary registration would enable an SDR to comply with the Dodd-Frank Act upon its effective date (*i.e.,* the later of 360 days after the date of its enactment or 60 days after publication of the final rule implementing Exchange Act Section 13(n))[43] regardless of any unexpected contingencies that may arise in connection with the filing of Form SDR. The temporary registration would also allow the Commission to implement the registration requirements of the Dodd-Frank Act for SDRs while still giving the Commission sufficient time to review fully the application of an SDR after it becomes operational, but before granting a registration that is not limited in duration. An SDR that is temporarily registered with the Commission would be subject to Exchange Act Section 13(n) and the rules and regulations thereunder during the period in which the Commission is reviewing the SDR's application of registration.

Notwithstanding the potential for temporary registration, the Commission encourages each SDR to apply for registration as soon as possible, following the Commission's adoption of final Rules 13n–1 through 13n–11, to permit sufficient time for an SDR to answer any questions that the Commission staff may have and to provide additional information or documentation, if necessary. The Commission will review applications in the order in which they are received. Applications received close to the effective date of the SDR registration requirement may not be reviewed and approved by the effective date.

Request for Comment

The Commission requests comment on the following specific issues:

• Is the Commission's proposed rule regarding temporary registration appropriate? If not, why not? For example, should the temporary registration be time-limited (*e.g.,* eighteen months from the date the registration is made effective)?

• Is the Commission's proposed rule for temporary registration sufficiently clear? If not, how can it be clarified?

• What conditions should apply to the granting of a temporary registration? For example, should a temporary registration be granted provided that an SDR's completed Form SDR suggests that it can comply with Exchange Act Section 13(n) and the rules and regulations thereunder?

• Is it feasible for an SDR to comply with Exchange Act Section 13(n) and the rules thereunder upon the effective date of the final rules applicable to SDRs? If not, which requirement(s) would be difficult for an SDR to comply with upon the effective date? Should such requirement(s) be imposed on an incremental, phased-in approach? If so, what would be an appropriate timeframe for such requirement(s) to be met?

• Are there specific requirements that the Commission should consider not requiring an SDR to comply with during the temporary registration period for reasons other than feasibility? If so, what requirements and for what reasons?

• Are there any other reasons not specified in this release upon which a temporary registration should be denied or rescinded?

• What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

4. Amendment on Form SDR

Under proposed Rule 13n–1(e), if any information reported in items 1 through 16, 25, and 44 of Form SDR or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, an SDR shall promptly file an amendment on Form SDR updating such information ("interim amendment"). Generally, an SDR would be required to file an amendment within 30 days from the time such information becomes inaccurate.

For example, a non-resident SDR should file an amendment promptly after any changes in the legal or regulatory framework that would impact its ability or the manner in which it provides the Commission with prompt access to its books and records or impacts the Commission's ability to inspect and examine the SDR onsite. The amendment should include a revised opinion of counsel describing how, as a matter of law, the SDR will continue to meet its obligations to provide the Commission with prompt access to the SDR's books and records and to be subject to the Commission's onsite inspection and examination under the new regulatory regime. As noted in Section III.A.1.a of this release, if a registered non-resident SDR

[42] Proposed Rule 13n–1(d).

[43] *See* Public Law 111–203, § 774.

becomes unable to comply with this requirement, because of legal or regulatory changes, or otherwise, then this may be a basis for the Commission to revoke the SDR's registration.

In addition to the proposed interim amendments, an SDR would be required to file an annual amendment on Form SDR, including all items subject to interim amendments, within 60 days after the end of its fiscal year.[44] Proposed Rule 13n–1(e) is consistent with the Commission's requirements for other registrants (*e.g.,* national securities exchanges, SIPs, broker-dealers) to file updated and annual amendments with the Commission.[45] The Commission believes that such amendments are important to obtain updated information on each SDR, which would assist the Commission in determining whether each SDR continues to be in compliance with the federal securities laws and the rules and regulations thereunder. Obtaining updated information would also assist the Commission in its inspection and examination of an SDR.

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed rule for interim amendments on Form SDR appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Is the proposed timeframe to file an amendment on Form SDR appropriate? If not, should the timeframe be shorter or longer?
- Should an SDR be required to file an interim amendment for any other items on Form SDR other than items 1 through 16, 25, and 44? If so, which item(s) and why?
- Should any of the items 1 through 16, 25, and 44 not be required to be amended in the interim? If so, which item(s) and why?
- Should interim amendments be required under any other circumstances not specified?
- Is the Commission's proposed rule requiring SDRs to file annual amendments on Form SDR appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Is an annual filing requirement redundant, in light of the requirement to update promptly the form, or should the annual filing be sufficient to obviate the need for prompt updates?
- Is the proposed timeframe to file an annual amendment on Form SDR appropriate? If not, should the timeframe be shorter or longer? Should the Commission permit the SDR to request an extension to file an annual amendment on Form SDR (*e.g.,* due to substantial, undue hardship)?

5. Service of Process and Non-Resident SDRs

The Commission is proposing Rule 13n–1(f) to require each SDR to designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, to accept any notice or service of process, pleadings, or other documents in any action or proceedings against the SDR to enforce the Federal securities laws and the rules and regulations thereunder. If an SDR appoints another agent to accept such notice or service of process, then the SDR would be required to file promptly an amendment on Form SDR updating this information.[46] Proposed Rule 13n–1(f) is intended to conserve the Commission's resources and to minimize any logistical obstacles (*e.g.,* locating defendants or respondents abroad) that the Commission may encounter when attempting to effect service. For instance, by prohibiting an SDR from designating a Commission member, official, or employee as its agent for service of process, the proposed rule would reduce a significant resource burden on the Commission, including resources to locate agents of registrants overseas and keep track of their whereabouts.

Proposed Rule 13n–1(g) would further require any non-resident SDR applying for registration pursuant to this rule to certify on Form SDR and provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the books and records of such SDR and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission. For the reasons stated in Section III.A.1.a above, the Commission preliminarily believes that before granting registration to a non-resident SDR, it is appropriate to obtain assurance and an opinion of counsel that such person has taken the necessary steps to be in the position to provide legally the Commission with prompt access to the SDR's books and records and to be subject to onsite inspection and examination by the Commission.

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed rule regarding service of process appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Should the Commission impose any minimum requirements on the agent whom a non-resident SDR designates to accept any notice or request for service of process?
- Are there any factors or alternatives that the Commission should take into consideration to ensure that there could be effective service of process on a non-resident SDR applying for registration as an SDR?
- Are there any factors that the Commission should take into consideration to ensure that a non-resident SDR seeking to register as an SDR can, in compliance with applicable foreign laws, provide the Commission with access to the SDR's books and records that are required pursuant to proposed Rule 13n–7(b), as discussed below, and submit to onsite inspection and examination by the Commission?
- Are any other documents or information necessary to establish a non-resident SDR's ability to comply with the federal securities laws and the rules and regulations thereunder?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

6. Definition of "Report"

Proposed Rule 13n–1(h) would provide that "[a]n application for registration or any amendment thereto that is filed pursuant to this [rule] shall be considered a 'report' filed with the Commission for purposes of Sections 18(a) and 32(a) of the [Exchange] Act and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder." Exchange Act Sections 18(a) and 32(a) set forth the potential liability for a person who makes, or causes to be made, any false or misleading statement in any "report" filed with the Commission (*e.g.,* Form SDR).[47]

[44] Proposed Rule 13n–1(e).

[45] *See* Exchange Act Rules 6a–2 and 15b3–1, 17 CFR 240.6a–2 and 240.15b3–1, respectively. *See also* 17 CFR 249.1001, *supra* note 28.

[46] *See* proposed Rule 13n–1(e).

[47] Exchange Act Section 18(a) provides, in part, that "[a]ny person who shall make or cause to be made any statement in any * * * report * * * which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such

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B. Proposed Rule Regarding Withdrawal From Registration

Proposed Rule 13n–2(b) would permit a registered SDR to withdraw from registration by filing a notice of withdrawal with the Commission. An SDR would be required to designate on its notice of withdrawal a person associated with the SDR [48] to serve as the custodian of the SDR's books and records.[49] The purpose of this requirement is to ensure that the books and records of an SDR are maintained and available to the Commission and other regulators after the SDR withdraws from registration, and to assist the Commission in enforcing proposed Rules 13n–5(b)(7) and 13n–7(c), as discussed below.

Prior to filing a notice of withdrawal, an SDR would be required to file an amended Form SDR to update any inaccurate information.[50] If there is no inaccurate information to update, then an SDR should include a confirmation to that effect in its notice of withdrawal. The Commission anticipates developing an online filing system through which an SDR can file its notice of withdrawal. The information filed would be available on the Commission's website. The Commission preliminarily believes that filing a notice of withdrawal in an electronic format would be less burdensome and more efficient for both the SDRs and the Commission.

Proposed Rule 13n–2(c) would provide that a notice of withdrawal from registration filed by an SDR shall become effective for all matters (except as provided in Rule 13n–2(c)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such SDR consents or which the Commission, by order, may determine as necessary or appropriate in the public interest or for the protection of investors, or within such shorter period of time as the Commission may determine. Proposed Rule 13n–2(d) would provide that a notice of withdrawal that is filed pursuant to this rule shall be considered a "report" filed with the Commission for purposes of Exchange Act Sections 18(a) and 32(a) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.

Under proposed Rule 13n–2(e), if the Commission finds, on the record after notice and opportunity for hearing, that any registered SDR has obtained its registration by making any false and misleading statements with respect to any material fact or has violated or failed to comply with any provision of the federal securities laws and the rules and regulations thereunder, the Commission, by order, may revoke the registration. The proposed rule would further provide that pending final determination of whether any registration shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing on the record, to be necessary or appropriate in the public interest or for the protection of investors.[51]

Finally, proposed Rule 13n–2(f) would provide that if the Commission finds that a registered SDR is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, may cancel the registration.

This proposed rule is similar to Exchange Act Rule 15b6–1, which relates to withdrawal from registration as a broker-dealer. The Commission believes that implicit in its authority to register an SDR is its authority to revoke or cancel such registration.

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed rule regarding withdrawal from registration appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Are the proposed definitions of "person associated with a security-based swap data repository" and "control" appropriate and sufficiently clear? If not, why not and how should they be defined?
- Should the Commission require an SDR to designate on its notice of withdrawal a custodian of the SDR's books and records? If not, why not and what would be a better alternative?
- Are there any other instances not specified in this proposed rule in which the Commission should have the authority to revoke or cancel an SDR's registration?
- Is the proposed effective date of 60 days from the filing of the notice of withdrawal with the Commission appropriate? If not, would an earlier or later date be more appropriate?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

C. Proposed Rule Regarding Registration of Successor to Registered SDR

1. Succession by Application

Proposed Rule 13n–3 would govern the registration of a successor to a registered SDR. Because this proposed rule is substantially similar to Exchange Act Rule 15b1–3, which governs the registration of a successor to a registered broker-dealer, the Commission is proposing to incorporate the concepts that the Commission explained when it adopted amendments to Rule 15b1–3.[52]

Specifically, proposed Rule 13n–3(a) would provide that in the event that an SDR succeeds to and continues the business of an SDR registered pursuant to Exchange Act Section 13(n), the registration of the predecessor shall be deemed to remain effective as the registration of the successor if, within 30 days after such succession, the successor files an application for registration on Form SDR, and the predecessor files a notice of withdrawal from registration with the Commission. A successor would not be permitted to "lock in" the 30-day window period by submitting an application that is incomplete in material respects.

The proposed rule would further provide that the registration of the

statement was false or misleading." 15 U.S.C. 78r(a). Exchange Act Section 32(a) provides, in part, that "[a]ny person who willfully and knowingly makes, or causes to be made, any statement in any * * * report * * * which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed." 15 U.S.C. 78ff(a).

[48] The term "person associated with a security-based swap data repository" would be defined as (i) any partner, officer, or director of such SDR (or any person occupying a similar status or performing similar functions), (ii) any person directly or indirectly controlling, controlled by, or under common control with such SDR, or (iii) any employee of such SDR. Proposed Rule 13n–2(a)(2). The term "control" (including the terms "controlled by" and "under common control with") would be defined as the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. Under the proposed rules, a person is presumed to control another person if the person: (i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions); (ii) directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or (iii) in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital. Proposed Rule 13n–2(a)(1).

[49] Proposed Rule 13n–2(b).

[50] *Id.*

[51] Proposed Rule 13n–2(e).

[52] *See* Registration of Successors to Broker-Dealers and Investment Advisers, Exchange Act Release No. 31661 (Dec. 28, 1992), 58 FR 7 (Jan. 4, 1993).

predecessor SDR shall cease to be effective 90 days after the application for registration on Form SDR is filed by the successor SDR.[53] In other words, the 90-day period would not begin to run until a complete Form SDR has been filed by the successor with the Commission. This 90-day period is consistent with proposed Rule 13n–1, pursuant to which the Commission would have 90 days to grant a registration or institute proceedings to determine if a registration should be denied.

The following are examples of the types of successions that would be required to be completed by filing an application: (1) An acquisition, through which an unregistered entity purchases or assumes substantially all of the assets and liabilities of the SDR and then operates the business of the SDR, (2) a consolidation of two or more registered entities, resulting in their conducting business through a new unregistered entity, which assumes substantially all of the assets and liabilities of the predecessor entities, and (3) dual successions, through which one registered entity subdivides its business into two or more new unregistered entities.

2. Succession by Amendment

Proposed Rule 13n–3(b) would further provide that notwithstanding Rule 13n–3(a), if an SDR succeeds to and continues the business of a registered predecessor SDR, and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor SDR on Form SDR to reflect these changes. Such amendment shall be deemed an application for registration filed by the predecessor and adopted by the successor. In all three types of successions, the predecessor must cease operating as an SDR. The Commission preliminarily believes that it is appropriate to allow a successor to file an amendment to the predecessor's Form SDR in these types of successions.

3. Scope and Applicability of Proposed Rule 13n–3

The purpose of proposed Rule 13n–3 is to enable a successor SDR to operate without an interruption of business by relying for a limited period of time on the registration of the predecessor SDR until the successor's own registration becomes effective. The proposed rule is intended to facilitate the legitimate transfer of business between two or more SDRs and to be used only where there is a direct and substantial business nexus between the predecessor and the successor SDR. The proposed rule would not allow a registered SDR to sell its registration, eliminate substantial liabilities, spin off personnel, or facilitate the transfer of the registration of a "shell" organization that does not conduct any business. No entity would be permitted to rely on proposed Rule 13n–3 unless it is acquiring or assuming substantially all of the assets and liabilities of the predecessor's SDR business.

Proposed Rule 13n–3 would not apply to reorganizations that involve only registered SDRs. In those situations, the registered SDRs need not use the rule because they can continue to rely on their existing registrations. The proposed rule would also not apply to situations in which the predecessor intends to continue to engage in SDR activities. Otherwise, confusion may result as to the identities and registration statuses of the parties.

Request for Comment

The Commission requests comment on the following specific issues:

- Is there a sufficient likelihood of successors to registered SDRs to warrant a successor rule?
- Is the Commission's proposed successor rule appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Are the 30-day and 90-day timeframes in the proposed successor rule appropriate? If not, what would be more appropriate timeframes and why?
- Are there any other instances not specified in the proposed rule in which a successor should be permitted to file an amendment to the predecessor's Form SDR for registration?
- Are there any reasons not to allow a successor to rely on its predecessor's registration by filing an amendment to the predecessor's Form SDR in the specified circumstances?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?
- Are there any factors not specified that the Commission should consider with respect to this proposed successor rule?

D. Proposed Rule Regarding Duties and Core Principles of SDRs

Section 763(i) of the Dodd-Frank Act requires an SDR to comply with the requirements and core principles described in Exchange Act Section 13(n) as well as any requirement that the Commission prescribes by rule or regulation in order to be registered and maintain registration as an SDR with the Commission.[54] The Commission is proposing Rule 13n–4, which would implement the enumerated duties and core principles and establish additional requirements by rule.

In May 2010, the Committee on Payment and Settlement Systems ("CPSS") and the Technical Committee of the International Organization of Securities Commissions ("IOSCO") issued a consultative report that presented a set of factors for trade repositories in the OTC derivatives markets to consider in designing and operating their services ("CPSS–IOSCO consultative report").[55] The OTC Derivatives Regulators' Forum [56] ("ODRF") has also made general recommendations relating to the functionality of trade repositories. The Commission's proposed rules draw from recommendations made by CPSS–IOSCO and the ODRF.

1. Enumerated Duties

Under Exchange Act Sections 13(n)(2), 13(n)(5), and 13(n)(6), each SDR is required to:

(1) Subject itself to inspection and examination by the Commission;

(2) Accept data as prescribed by the Commission for each SBS; [57]

[53] Proposed Rule 13n–3(a).

[54] *See* Public Law 111–203, § 763(i). The legislation also authorizes the Commission to establish additional requirements for SDRs by rule or regulation.

[55] *See* Considerations for Trade Repositories in OTC Derivatives Markets, CPSS–IOSCO (May 2010) (*available at http://www.bis.org/press/p100512.htm*). CPSS is a forum for central banks to monitor and analyze developments in payment and settlement arrangements as well as in cross-border and multicurrency settlement schemes. *See* Press Release, CPSS–IOSCO, CPSS and IOSCO Consult on Policy Guidance for Central Counterparties and Trade Repositories in the OTC Derivatives Market (May 12, 2010) (*available at http://www.bis.org/press/p100512.htm*). IOSCO is an international policy forum for securities regulators. The objective of the Technical Committee, a specialized working group established by IOSCO's Executive Committee, is to review major regulatory issues related to international securities and futures transactions and to coordinate practical responses to these concerns. *See id.*

[56] The OTC Derivatives Regulators' Forum is comprised of international financial regulators, including central banks, banking supervisors, and market regulators, resolution authorities, and other governmental authorities that either have direct authority over OTC derivatives market infrastructure providers or major OTC derivatives market participants or that consider OTC derivative market matters more broadly. *See* OTC Derivatives Regulators' Forum Overview, *http://www.otcdrf.org/*.

[57] In a separate proposal, the Commission is proposing rules prescribing the data elements that an SDR is required to accept for each SBS in association with requirements under Section 763(i)

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(3) Confirm with both counterparties to the SBS the accuracy of the data that was submitted, as discussed further in Section III.E.2.a of this release;

(4) Maintain the data in such form, in such manner, and for such period as prescribed by the Commission, as discussed further in Section III.E.2 of this release;

(5) Provide direct electronic access to the Commission (or any designee of the Commission), including another registered entity;

(6) Provide such information in such form and at such frequency as the Commission may require to comply with requirements set forth in Exchange Act Section 13(m) and the rules and regulations thereunder; [58]

(7) At such time and in such manner as may be directed by the Commission, establish automated systems for monitoring, screening, and analyzing data;

(8) Maintain the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer,[59] counterparty, or any registered entity, as discussed further in Section III.I of this release;

(9) On a confidential basis pursuant to Exchange Act Section 24 and the rules and regulations thereunder, upon request, and after notifying the Commission of the request, make available all data obtained by the SDR, including individual counterparty trade and position data, to the following:

(i) Each appropriate prudential regulator; [60]

(ii) The Financial Stability Oversight Council;

(iii) The CFTC;

(iv) The Department of Justice; and

(v) The FDIC [61] and any other person that the Commission determines to be appropriate, including, but not limited to—

(i) Foreign financial supervisors (including foreign futures authorities);

(ii) Foreign central banks; and

(iii) Foreign ministries.

(10) Before sharing information with any entity described in Exchange Act Section 13(n)(5)(G), obtain a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in Exchange Act Section 24 and the rules and regulations thereunder relating to the information on SBS transactions that is provided, and each entity shall agree to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under Exchange Act Section 24 and the rules and regulations thereunder ("indemnification provision"); and

(11) Designate a CCO who must comply with the duties set forth in Exchange Act Section 13(n)(6).

With respect to the SDR's duty to provide direct electronic access to the Commission or any designee of the Commission, the Commission is proposing to define "direct electronic access" to mean access, which shall be acceptable to the Commission, to data stored by an SDR in an electronic format and updated at the same time as the SDR's data is updated so as to provide the Commission or any of its designees with the ability to query or analyze the data in the same manner that the SDR can query or analyze the data.[62] The Commission may specify the form and manner in which an SDR provides direct electronic access. The Commission is considering different—and possibly multiple—ways in which an SDR may be required or permitted to provide direct electronic access, including, but not limited to, (1) a direct streaming of the data maintained by the SDR to the Commission or any of its designees, (2) a user interface that provides the Commission or any of its designees with direct access to the data maintained by the SDR and that provides the Commission or any of its designees with the ability to query or analyze the data in the same manner that is available to the SDR, or (3) another mechanism that provides a mirror copy of the data maintained by the SDR, which is in an electronic form that is downloadable by the Commission or any of its designees and is in a format that provides the ability to query or analyze the data in the same manner that is available to the SDR.

The Commission is not proposing in this release that an SDR establish automated systems for monitoring, screening, and analyzing SBS data. The Commission believes that a measured approach to addressing this provision of the Dodd-Frank Act is appropriate. The market infrastructure of the SBS market is in its infancy. The Dodd-Frank Act and the rules and regulations that the Commission will promulgate over the next year will direct further development and refinement of this market. As the infrastructure for the SBS market continues to develop and the Commission gains experience in regulating this market, the Commission will consider further steps to implement this statutory provision.[63]

With respect to an SDR's duty to notify the Commission when any entity described in Exchange Act Section 13(n)(5)(G) requests directly from the SDR access to data obtained by the SDR, the SDR must keep such notifications and any related requests confidential.[64] Failure by an SDR to treat such notifications and requests confidential could render ineffective or could have adverse effects on the underlying basis for the requests. If, for example, a regulatory use of the data is improperly disclosed, such disclosure could possibly signal a pending investigation or enforcement action, which could have detrimental effects.

With respect to the indemnification provision, the Commission understands that regulators may be legally prohibited or otherwise restricted from agreeing to indemnify third parties, including SDRs

of the Dodd-Frank Act (adding Exchange Act Section 13(n)(4)(A) relating to standard setting and data identification). *See* Regulation SBSR Release (proposed Rule 901), *supra* note 9. Any comments regarding the data elements should be submitted in connection with that proposal.

[58] Exchange Act Section 13(m) pertains to the public availability of SBS data. *See* Public Law 111–203, § 763(i). In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(m)), the Commission is proposing rules that would impose various duties on SDRs in connection with the reporting and real-time public dissemination of SBS transaction information. *See* Regulation SBSR Release, *supra* note 9. Any comments regarding Exchange Act Section 13(m) should be submitted in connection with that proposal.

[59] Section 761 of the Dodd-Frank Act codified the term "security-based swap dealer" at Exchange Act Section 3(a)(71) to generally mean any person that holds itself out as a dealer in SBSs, makes a market in SBSs, regularly enters into SBSs with counterparties as an ordinary course of business for its own account, or engages in any activity causing it to be commonly known in the trade as a dealer or market maker in SBSs. *See* Public Law 111–203, § 761; *see also* Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 62717 (Aug. 13, 2010), 75 FR 51429 (Aug. 20, 2010).

[60] "Prudential regulator" is defined in Exchange Act Section 3(a)(74) to have the same meaning as in the CEA. See Public Law 111–203, § 761. The CEA identifies the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation ("FDIC"), the Farm Credit Administration, and the Federal Housing Finance Agency as prudential regulators. *See* Public Law 111–203, § 721(a)(17) (adding Section 1a(39) of the CEA, 7 U.S.C. 1a(39)).

[61] Subject to the statutory requirements of Sections 13(n)(5)(G) and (H), the FDIC, for example, would have access to all data maintained by an SDR, including in connection with its resolution authority under Title II of the Dodd-Frank Act or the Federal Deposit Insurance Act and with respect to SBS data in the SDR related to all counterparties to SBS transactions.

[62] *See* proposed Rule 13n–4(a)(5).

[63] In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(n)(5)(E)), the Commission is considering proposing rules that would require SDRs to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims. Any comments regarding the end-user clearing exemption proposed rules should be submitted in connection with that proposal.

[64] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(5)(G)).

as well as the Commission. The indemnification provision could chill requests for access to data obtained by SDRs, thereby hindering the ability of others to fulfill their regulatory mandates and responsibilities. The Commission preliminarily believes that by having access to such data, however, regulators would be in a better position to, among other things, monitor risk exposures of individual counterparties to swap and SBS transactions, monitor concentrations of risk exposures, and evaluate systemic risks.[65] As such, the Commission expects that an SDR would not go beyond the minimum requirements of the statute so as not to preclude entities described in Exchange Act Section 13(n)(5)(G) from obtaining the data maintained by an SDR.

The Commission notes that, pursuant to Exchange Act Section 24 and Rule 24c–1 thereunder, the Commission may share nonpublic information[66] in its possession with, among others, "federal, state, local, or foreign government, or any political subdivision, authority, agency or instrumentality of such government * * * [or] a foreign financial regulatory authority." Pursuant to Exchange Act Section 21(a), the Commission also may assist a foreign securities authority in investigating whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces.[67]

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed rule incorporating the enumerated duties appropriate and sufficiently clear? If not, what would be a better alternative?
- Under Exchange Act Section 13(n)(2), an SDR shall be subject to inspection and examination by any representative of the Commission. Should the Commission specify in its rule or clarify when the Commission anticipates inspecting prospective or newly registered SDRs?
- Is the Commission's proposed definition of "direct electronic access" appropriate and sufficiently clear? If not, how can the Commission clarify this definition?
- What are the advantages and disadvantages of requiring SDRs to provide a direct streaming of data to the Commission or its designee? Should the Commission require periodic electronic transfer of data as an alternative? If so, how often should such transfer occur (*e.g.,* hourly, a few times a day, every few days, once a week)?
- What are the advantages and disadvantages of requiring SDRs to provide a user interface that provides the Commission or any of its designees access to the data maintained by the SDR and that provides the Commission or its designee with the ability to query or analyze the data in the same manner that is available to the SDR?
- What are the advantages and disadvantages of requiring SDRs to provide a mirror copy of its data, which is in an electronic form that is downloadable and is in a format that provides the ability to query or analyze the data in the same manner that is available to the SDR?
- What would be the most feasible and cost-effective method for an SDR to provide direct electronic access to the Commission or its designee?
- Are there other methods of providing direct electronic access to the Commission or its designee that the Commission should consider?
- Are there any other factors that the Commission should take into consideration when requiring SDRs to provide the Commission or its designee with direct electronic access?
- What would be the advantages and disadvantages of the Commission appointing as its designee for direct electronic access another registered SDR, to which SDRs would grant direct electronic access and which would consolidate the data that would then be provided to the Commission?
- Are there specific reports or sets of data that the Commission should consider obtaining from SDRs to monitor risk exposures of individual counterparties to SBS transactions, to monitor concentrations of risk exposures, or for other purposes that would help encourage the transparency and open trading of SBSs?
- In addition to the data already subject to the Commission's request,[68] are there additional reports or sets of data that the Commission should consider obtaining from SDRs to evaluate systemic risk or that could be used for prudential supervision?
- Are there any other reports or sets of data that the Commission should consider obtaining from SDRs?
- Should the Commission require SDRs to establish automated systems for monitoring, screening, and analyzing SBS data or provide the data for the Commission to perform these functions? Should the Commission require SDRs to monitor, screen, and analyze all SBS data in their possession in such a manner as the Commission may require, including in connection with *ad hoc* requests by the Commission?
- Besides the FDIC, should the Commission specify in its rules any other appropriate person to have access to all data maintained by an SDR (*e.g.,* the Federal Reserve Bank of New York)?
- Are there alternative ways that the Commission could address the indemnification provision while being consistent with Exchange Act Section 13(n)(5)(H)?
- Should the Commission provide in its rules specific indemnification language that an SDR would be required to use when requesting indemnification from entities described in Exchange Act Section 13(n)(5)(G)? If so, what indemnification language would address the requirements of the statute and the needs of information users?
- Alternatively, should the Commission explicitly require that the indemnification agreement be fair and not unreasonably discriminatory so as not to preclude entities described in Exchange Act Section 13(n)(5)(G) from obtaining the data maintained by an SDR?
- Should the Commission limit the amount of indemnification to an SDR and the Commission? If so, what should the limit be? For example, should it be limited to only reasonable litigation expenses (and not any damages) in order to facilitate the ability of entities

[65] *See* Duffie *et al., supra* note 13 (Regulators can "explore the sizes and depths of the markets, as well as the nature of the products being traded. With this information, regulators are better able to identify and control risky market practices, and are better positioned to anticipate large market movements.").

[66] Under Rule 24c–1, the term "nonpublic information" means "records, as defined in Section 24(a) of the [Exchange] Act, and other information in the Commission's possession, which are not available for public inspection and copying." 17 CFR 240.24c–1.

[67] Exchange Act Section 21(a)(2) provides: "On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States." 15 U.S.C. 78u(a)(2). Exchange Act Section 3(a)(50) defines "foreign securities authority" to mean "any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matter." 15 U.S.C. 78c(a)(50).

[68] *See* Regulation SBSR Release, *supra* note 9.

described in Exchange Act Section 13(n)(5)(G) to obtain data maintained by an SDR?

- Should the Commission impose any additional duties on SDRs? For example, should SDRs be required to provide downstream processing services or ancillary services (*e.g.,* managing life cycle events and asset servicing)?
- Should any additional duties imposed on SDRs depend on the asset class of SBSs that the SDR is collecting and maintaining? If so, clarify.
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- How might the evolution of the SBS market over time affect SDRs or impact the Commission's proposed rule?

2. Implementation of Core Principles

Each SDR is required, under Exchange Act Section 13(n)(7), to comply with core principles relating to (1) market access to services and data, (2) governance arrangements, and (3) conflicts of interest. Specifically, unless necessary or appropriate to achieve the purposes of the Exchange Act and the rules and regulations thereunder, an SDR [69] is prohibited from adopting any policies and procedures or taking any action that results in any unreasonable restraint of trade or imposing any material anticompetitive burden on the trading, clearing, or reporting of transactions. In addition, each SDR must establish governance arrangements that are transparent to fulfill the public interest requirements under the Exchange Act and the rules and regulations thereunder; to carry out functions consistent with the Exchange Act, the rules and regulations thereunder, and the purposes of the Exchange Act; and to support the objectives of the federal government, owners of the SDR, and market participants. Moreover, each SDR must establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest in the SDR's decision-making process and to establish a process for resolving any such conflicts of interest. Proposed Rule 13n–4(c) incorporates and implements these three core principles.

a. First Core Principle: Market Access to Services and Data [70]

In implementing the first core principle, the Commission is proposing rules that are intended to protect investors and to maintain a fair, orderly, and efficient SBS market. These proposed rules would protect investors by, for example, fostering transparency in the services that an SDR provides and its pricing for such services as well as promoting competition in the SBS market. As discussed more fully below, when administering these rules, the Commission would generally expect to apply the principles and procedures it has developed in other areas in which it monitors analogous services, such as clearing agencies.

First, proposed Rule 13n–4(c)(1)(i) would require each SDR to ensure that any dues, fees, or other charges it imposes, and any discounts or rebates it offers, are fair and reasonable and not unreasonably discriminatory.[71] Such dues, fees, other charges, discounts, or rebates shall be applied consistently across all similarly situated users of the SDR's services, including, but not limited to, market participants,[72] market infrastructures (including central counterparties), venues from which data can be submitted to the SDR (including exchanges, SB SEFs, electronic trading venues, and matching and confirmation platforms), and third party service providers.

The terms "fair" and "reasonable" often need standards to guide their application in practice. One factor commonly taken into consideration to evaluate the fairness and reasonableness of fees, particularly those of a monopolistic provider of a service, is the cost incurred to provide the service.[73] The Commission does not, however, intend to establish fees or rates, or to dictate formulas by which fees or rates are determined. Based on our experience with other registrants, the Commission would need to take a flexible approach and evaluate the fairness and reasonableness of an SDR's charges on a case-by-case basis. The Commission recognizes that there may be instances in which an SDR would charge different users different prices for the same or similar services. Such differences, however, cannot be unreasonably discriminatory. For example, if an SDR's policies and procedures provide that it may accept an electronic confirmation as reasonable documentation that the data submitted by both counterparties to an SBS is accurate, then an SDR may charge a smaller fee to a market participant that is expected to send a large volume of data that is all electronically confirmed. If, on the other hand, an SDR requires greater resources to contact a counterparty to reasonably satisfy itself that the data that was submitted to the SDR is accurate, then higher fees may be appropriate. The Commission preliminarily believes that an SDR should make reasonable accommodations, including consideration of any cost burdens, on a non-reporting counterparty of an SBS transaction in connection with any follow-up by the SDR regarding the accuracy of the SBS transaction data.

Second, proposed Rule 13n–4(c)(1)(ii) would require each SDR to permit market participants to access specific services offered by the SDR separately. Although an SDR would be allowed to bundle its services, including any ancillary services, this proposed rule would require the SDR to also provide market participants with the option of using its services separately.[74] For instance, if an SDR or its affiliate

[69] Although Exchange Act Section 13(n)(7)(A) refers to "swap data repository," the Commission believes that the Congress intended it to refer to "security-based swap data repository."

[70] The Dodd-Frank Act refers to the first core principle as "antitrust considerations," which the Commission believes include market access to services offered by and data maintained by SDRs. *See* Public Law 111–203, § 763(i).

[71] The Exchange Act applies a similar standard for other registrants. *See, e.g.,* Exchange Act Section 6(b)(4) ("The rules of the exchange [shall] provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities"); Exchange Act Section 17A(b)(3)(D) ("The rules of the clearing agency [shall] provide for the equitable allocation of reasonable dues, fees and other charges among its participants"); *see also* Exchange Act Sections 11A(c)(1)(C) and (D) (providing that the Commission may prescribe rules to assure that all SIPs may, "for purposes of distribution and publication, obtain on fair and reasonable terms such information" and to assure that "all other persons may obtain on terms which are not unreasonably discriminatory" the transaction information published or distributed by SIPs).

[72] The term "market participant" would be defined as any person participating in the SBS market, including, but not limited to, SBS dealers, major SBS participants, and any other counterparties to an SBS transaction. Proposed Rule 13n–4(a)(7).

[73] *See* Regulation of Market Information Fees and Revenues, Exchange Act Release No. 42208 (Dec. 17, 1999).

[74] *See also* CPSS–IOSCO, *supra* note 55 ("To the extent a [trade repository] provides complementary post-trade processing services, these should be available independently from its recordkeeping function so that users can selectively utilise the services they require from the suite of services a [trade repository] may offer.").

provides an ancillary matching and confirmation service, then the SDR would be prohibited from requiring a market participant to use and pay for that matching and confirmation service as a condition of using the SDR's data collection service. In evaluating the fairness and reasonableness of fees that an SDR charges for bundled and unbundled services, the Commission would take into consideration the cost to the SDR of making those services available on a bundled or unbundled basis, as the case may be.

Third, proposed Rule 13n–4(c)(1)(iii) would require each SDR to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the SDR, and third party service providers that seek to connect to or link with the SDR. The Commission is concerned, among other things, that an SDR, controlled or influenced by a market participant, may limit the level of access to the services offered or data maintained by the SDR as a means to impede competition from other market participants or third party service providers. To satisfy the requirements of this proposed rule, an SDR should seek to ensure that its practices and procedures do not stifle innovation and competition in the provision of post-trade processing services. The Commission concurs with the CPSS–IOSCO consultative report's recommendation that "[r]equirements that limit access and participation on grounds other than risks should be avoided" and that "[d]enials of access should only be based on risk-related criteria" [75] (*e.g.,* risks related to the security or functioning of the SDR). Moreover, "[m]arket infrastructures and service providers that may or may not offer potentially competing services should not be subject to anti-competitive practices such as product tying, contracts with non-compete and/or exclusivity clauses, overly restrictive terms of use and anti-competitive price discrimination." [76]

Finally, proposed Rule 13n–4(c)(1)(iv) would require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly. The Commission preliminarily believes that for any such policies and procedures to be reasonable, at a minimum, those involved in the decision-making process of prohibiting or limiting a person from access to an SDR's services or data cannot be involved in the review of whether the prohibition or limitation was appropriate. Otherwise, the purpose of the review process would be undermined. An SDR should consider whether its internal review process is best delegated to the SDR's board of directors, a body performing a function similar to the board of directors (collectively, "board"), or an executive committee.

Request for Comment

The Commission requests comment on the following specific issues:

- Are the Commission's proposed rules implementing the first core principle appropriate and sufficiently clear? If not, why not and what would be better alternatives?
- Is the Commission's proposed definition of "market participant" appropriate? If not, is it over-inclusive or under-inclusive and how should it be defined?
- Would the proposed rules relating to fees provide sufficient flexibility to SDRs such that they can operate in a commercially viable manner?
- Besides an SDR's costs of providing its services, what other factors should the Commission consider in determining whether the SDR's fees, dues, other charges, rebates, or discounts for such services are fair and reasonable?
- Are there circumstances in which it would be fair or reasonable for an SDR to charge a reporting or non-reporting counterparty to an SBS a fee or require that a counterparty invest in certain technologies to satisfy the SDR that the SBS data submitted to the SDR is accurate? Under what circumstances and for what purposes might allowing SDRs to charge higher fees or requiring counterparties to invest in certain technologies be appropriate?
- Is the Commission's proposed rule requiring an SDR's fees to be fair, reasonable, and non-discriminatory appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Are there circumstances in which it would be fair and reasonable for an SDR to charge a counterparty to an SBS a fee to satisfy itself that the SBS data submitted to the SDR by the other counterparty to the SBS is accurate?
- In what instances would an SDR differentiate among its users with respect to fees, dues, other charges, discounts, and rebates? Should any of those instances be explicitly prohibited or restricted?
- Are there any other requirements that the Commission should impose on an SDR that would promote competition?
- Is the Commission's proposed rule requiring an SDR to permit market participants to access specific SDR services separately appropriate and sufficiently clear? If not, why not?
- Are there instances in which permitting an SDR to offer bundled services that are not provided separately would be better for market participants or the SBS market as a whole? For example, would bundling certain services improve data quality or promote efficiency? If so, what services should be permitted to be bundled?
- Are there any other factors not mentioned that the Commission should take into consideration with respect to requiring the unbundling of services and fees?
- Should the Commission require an SDR to notify the Commission about the outcome of the SDR's internal review of any prohibition or limitation of access to its services or data? If so, should the Commission specify a timeframe in which an SDR must notify the Commission? What should the timeframe be?
- Are the Commission's proposed rules regarding an SDR's criteria relating to access to services and data and participation appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Should the Commission prescribe specific criteria for fair, open, and not unreasonably discriminatory access and participation? If so, what should the criteria be?
- In what instances (besides risk-related reasons) would it be reasonable for an SDR to deny access to its services and data?
- Is the Commission's proposed rule requiring an SDR to review its denials of access appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Are there any measures that the Commission can require that would result in a more meaningful internal review process? For example, should the Commission explicitly require that the board review all denials of access? If so, within what timeframe should the review be completed?

[75] *See* CPSS–IOSCO, *supra* note 55.

[76] *Id.*

• Should the Commission require an SDR to promptly file notice with the Commission if the SDR, in its capacity as an SDR rather than a SIP, prohibits or limits any person's access to services offered or data maintained by the SDR? If not, why not and what would be a better approach?

• What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

• How might the evolution of the SBS market over time affect SDRs or impact the Commission's proposed rule?

• What is the likely impact of the Commission's proposed rule on the development and use of different technologies for reporting SBS transaction information to SDRs and for accessing the services offered and data maintained by SDRs?

b. Second Core Principle: Governance Arrangements

To implement the second core principle, proposed Rule 13n-4(c)(2) would require each SDR to establish governance arrangements that are well defined and include a clear organizational structure with effective internal controls. The proposed rule would also require an SDR's governance arrangements to provide for fair representation of market participants.[77] This requirement is similar to requirements imposed on exchanges.[78] Additionally, an SDR would be required to provide representatives of market participants, including end-users,[79] who are on the board with the opportunity to participate in the process for nominating directors and with the right to petition for alternative candidates.[80] The Commission notes that directors of an SDR owe a fiduciary duty to the SDR and all of its shareholders, and that the board as a whole is ultimately responsible for overseeing the SDR's compliance with the SDR's statutory obligations.

The proposed rule would further require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, to have a clear understanding of their responsibilities, and to exercise sound judgment about the SDR's affairs.[81] This proposed requirement is based on a recommendation in the CPSS–IOSCO consultative report.[82] Given an SDR's unique role in an SBS market, the Commission preliminarily believes that it is particularly important that those who are managing and overseeing an SDR's activities are qualified to do so. An SDR's failure to comply with its statutory obligations, for example, could impact the SBS market as a whole.

As part of its consideration of governance issues as they pertain to SDRs, the Commission is considering whether potential conflicts between commercial incentives of owners of an SDR and statutory objectives would warrant prescriptive rules relating to governance, particularly in light of the Commission's general oversight authority and the other specific rules proposed in this release intended to minimize conflicts and ensure that SDRs meet core principles.[83] As discussed further below, the owners of an SDR may have an interest in maximizing the potential commercial value of the information reported to the SDR, which depends on the extent to which the SDR and its affiliates are permitted to use such information for commercial purposes. The Commission is not at this time proposing to preclude an SDR or its affiliates from making commercial use of the transaction data, *e.g.,* by developing analytical reports or tools that are derived from aggregate transaction reports. This commercial interest may conflict with the statutory objective of protecting data privacy and providing for fair and open access to the data maintained by the SDR. For example, an SDR might attempt to restrict access to parties who would seek to use the data for their own commercial purposes.

In order to address this issue, the Commission could choose to prescribe minimum requirements pertaining to board composition or impose ownership restrictions. For example, the Commission could require each SDR to establish a governance arrangement with a certain percentage of independent directors[84] (*e.g.,* majority of independent directors, 35% independent directors) on its board and any committee that has the delegated authority to act on behalf of the board so as not to undermine the effect of the former requirement. The Commission could also require each SDR to establish a nominating committee that is composed of a certain percentage of independent directors (*e.g.,* majority or solely composed of independent directors). Additionally, the Commission could require each SDR to establish governance arrangements that would restrict any SDR participant and its related persons or any person and its related persons[85] from (1) beneficially owning,[86] directly or indirectly, any

[77] Proposed Rule 13n-4(c)(2)(ii).

[78] Exchange Act Section 6(b)(3) requires that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of its affairs, and must provide that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. *See* 15 U.S.C. 78f(b)(3).

[79] The term "end-user" would be defined as any counterparty that is described in Exchange Act Section 3C(g)(1) and the rules and regulations thereunder. Proposed Rule 13n-4(a)(6).

[80] Proposed Rule 13n–4(c)(2)(iii).

[81] Proposed Rule 13–4(c)(2)(iv).

[82] *See* CPSS–IOSCO, *supra* note 55.

[83] *See, e.g.,* proposed Rule 13n-4(c)(1) (implementing core principle relating to market access to SDRs' services and data), *supra* Section III.D.2.a; proposed Rule 13n-4(c)(3) (implementing core principle relating to conflicts of interest), *infra* Section III.D.2.c; and proposed Rule 13n-5 (requiring an SDR to accept all SBSs in a given asset class if it accepts any SBS in that asset class), *infra* Section III.E.2.a. *See also* Item 32 of proposed Form SDR (requiring disclosure of instances in which an SDR has prohibited or limited a person with respect to access to the SDR's services or data).

[84] The term "independent director" may generally be defined as a director who has no material relationship with the SDR, any affiliate of the SDR, an SDR participant, or any affiliate of an SDR participant. The term "material relationship" may be defined as a relationship, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the director. The term "participant" when used with respect to an SDR may be defined as any person who uses an SDR's services. Such term would not include a person whose only use of an SDR is through another person who is a participant.

[85] The term "related person" may be defined as (i) any affiliate of an SDR participant; (ii) any person associated with an SDR participant; (iii) any immediate family member of an SDR participant who is a natural person, or any immediate family member of the spouse of such person, who, in each case, has the same home as the SDR participant, or who is a director or officer of the SDR, or any of its parents or subsidiaries; or (iv) any immediate family member of a person associated with an SDR participant who is a natural person, or any immediate family member of the spouse of such person, who, in each case, has the same home as the person associated with the SDR participant or who is a director or officer of the SDR, or any of its parents or subsidiaries. The term "immediate family member" may be defined as a person's spouse, parents, children, and siblings, whether by blood, marriage, or adoption, or anyone residing in such person's home.

[86] The term "beneficial ownership" (including the terms "beneficially owns" or any variation thereof)

interest in the SDR that exceeds a certain percentage (*e.g.,* 20 percent for any SDR participant and its related persons, 40 percent for any person and its related persons) of any class of securities, or other ownership interest, entitled to vote of such SDR, or (2) directly or indirectly voting, causing the voting of, or giving any consent or proxy with respect to the voting of, any interest in the SDR that exceeds a certain percentage (*e.g.,* 20 percent) of the voting power of any class of securities or other ownership interest of such SDR. The Commission recently has proposed similar requirements for SBS clearing agencies and SB SEFs, which pose a different set of competing interests.[87]

Request for Comment

- Should the Commission's proposed rule regarding fair representation of market participants include fair representation of others (*e.g.,* public representation)? What are the advantages and disadvantages of including others?
- What requirements, if any, should be in place with respect to the duties owed by the board to mitigate tensions between commercial interests and statutory goals? What types of tensions might exist and how do they compare in severity and consequences to those that exist in clearing agencies or exchanges?
- Is the proposed definition of "end-user" appropriate and sufficiently clear? If not, why not and how should it be defined?
- Should end-users or any other group be given guaranteed rights of participation in an SDR's governance? Alternatively, should the Commission require an SDR to establish governance arrangements whereby certain market participants, including end-users, may consult with the board on matters of concern?
- Is requiring an SDR's management to meet certain minimum standards appropriate? If not, what would be a better alternative?
- Is requiring the members of an SDR's board or committee(s) to meet certain minimum standards appropriate? Does the answer depend upon whether the Commission requires that a certain percentage of the SDR's board be independent? If so, in what way? Would minimum standards have a significant effect on the experience and efficiency of an SDR's board?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule encourage or impede competition and the establishment of a greater number of SDRs?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare with the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- How might the evolution of the SBS market over time affect SDRs or impact the Commission's proposed rule?
- Should the Commission require an SDR to have independent directors on its board and board committees? If not, why not and what would be a better alternative to improve governance and mitigate any tensions between commercial interests and statutory goals? If so, what should be the required composition of the board and each board committee? How should the terms "independent director" and "related person" be defined? Should the Commission rely on definitions from existing rules (*e.g.,* Exchange Act Rule 10A–3(b)(1)(ii)(A) or Instruction 1 to Item 404(a) of Regulation S–K)?
- Would requiring the board and each board committee to be composed of at least 35% independent directors improve governance of the SDR or effectively address concerns pertaining to conflicting interests of SDR owners? What potential benefits or drawbacks might result from requiring at least 35% of an SDR's board and each board committee to be independent directors? Would 35% be sufficient to give independent directors a meaningful voice within the board and board committees? If not, would a higher or lower level be appropriate?
- Should the Commission require that a majority of an SDR's board and each board committee be independent directors? What potential benefits or drawbacks might result from such a requirement? Would a majority independent board be likely to enhance an SDR's management of any tensions between commercial interests and statutory goals or to enhance its compliance with the proposed rules? Would a majority independent board be necessary to ensure that an SDR appropriately manages any tensions between commercial interests and statutory goals?
- Should there be a minimum requirement on the number of independent directors on the board or each board committee? If so, what should the minimum requirement be and why? For example, would a minimum requirement of two independent directors be sufficient?
- How are independent directors likely to affect the activities of the SDR? What are their incentives to assure open and fair access to the services offered and data maintained by the SDR? Do independent directors have any conflicts of interest that would affect their ability to facilitate this objective?
- Would participant owners of an SDR be able to exercise undue influence over an SDR even if at least 35% of the board consists of independent directors? Would the requirement of at least 35% independent board effectively insulate an SDR from undue influence by its participant owners?
- Would participant owners of an SDR be able to exercise undue influence over an SDR even if the majority of the board consists of independent directors? Would the requirement of a majority independent board effectively insulate an SDR from undue influence by its participant owners?
- Should the Commission require each SDR to establish a nominating committee? If not, why not and what would be a better approach? If so, what should be the required composition of the nominating committee? Would 51 percent, 100 percent, or some other percentage be sufficient to avoid undue influence by participants? What is the potential impact of requiring the nominating committee to be composed of a majority of independent directors? What is the potential impact of requiring the nominating committee to be solely composed of independent directors? What is the likely impact of requiring the nominating committee to be composed of another percentage of independent directors? Should the Commission require that all or a majority of the nominating committee be independent even if it does not establish requirements for independent directors on an SDR's board? Why or why not? What are the benefits or drawbacks of composition requirements directed specifically to an SDR's nominating committee?
- Should the Commission require an SDR to establish any other committee? If so, what would be the responsibilities of such committee?

may have the same meaning, with respect to any security or other ownership interest, as set forth in Exchange Act Rule 13d-3(a), as if such security or other ownership interest were a voting equity security registered under Exchange Act Section 12; provided that to the extent any person is a member of a group within the meaning of Exchange Act Section 13(d)(3), such person shall not be deemed to beneficially own such security or other ownership interest for purposes of this section, unless such person has the power to direct the vote of such security or other ownership interest.

[87] *See* Exchange Act Release No. 63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010).

• Should the Commission impose any ownership and voting limitations on SDR participants and others? If not, why not and what would be a better alternative to minimize any tensions between commercial interests and statutory goals? If so, what should the required ownership and voting limitations be? For example, would 20% ownership and voting limitations on an SDR participant and its related persons be sufficient to limit the ability of a market participant or a group of participants from exercising undue influence or control over the governance of the SDR? Should the 20% limitations be higher or lower given the existing concentration of the industry in a small number of large dealers? Would a 40% ownership limitation for any person and its related persons be sufficient to limit anyone from exercising undue influence or control over the governance of the SDR? Should the 40% ownership limitation be higher or lower given the existing concentration of the industry in a small number of large dealers?

• Would requirements related to the governance arrangements (*i.e.,* independent directors, nominating committee) of an SDR be more or less effective than ownership or voting limitations at addressing any tensions between commercial interests and statutory goals? Could restrictions regarding the governance arrangements of an SDR, on their own, be sufficient to effectively address concerns pertaining to undue influence (assuming that such restrictions are necessary for this purpose)? Would it be appropriate or necessary to require both governance arrangements and ownership or voting limitations in order to effectively address these concerns?

• If the Commission were to require ownership and voting interest limitations, should the Commission permit an SDR's board to waive the limitations for a person who is not an SDR participant and its related persons provided that certain conditions are met? If so, under what conditions (*e.g.,* waiver is consistent with the SDR's statutory obligations, waiver would not impair the Commission's ability to enforce the Federal securities laws and the rules and regulations thereunder, such person and its related persons can comply with the Federal securities laws and the rules and regulations thereunder, such person and its related persons irrevocably submit to the jurisdiction of the United States federal courts and Commission, such person's books and records related to an SDR's activities would be subject at all times to the Commission's inspection and examination, the Commission would have access to such person's books and records at all times)? Should the waiver be subject to the Commission's review?

• If the Commission were to impose ownership and voting interest limitations, should limitations be phased in for SDRs to provide a grace period for those entities that would not meet the limits at the outset, but that could potentially meet them at a later date, *e.g.,* one year after the registration of an SDR with the Commission?

• If the Commission were to impose ownership and voting interest limitations, should the Commission specifically require remediation by any SDR when any person and its related persons exceed the ownership or voting limitations? For example, should the Commission explicitly require that an SDR's policies and procedures provide a mechanism to divest any interest owned or not give effect to any voting interest held by any person and its related persons in excess of the proposed limitations?

• Are there other methods for mitigating any tensions between commercial interests and statutory goals without placing any voting and ownership limitations?

• Are there potential ways to more narrowly target voting and ownership limitations while effectively mitigating any tensions between commercial interests and statutory goals?

• How do potential tensions between commercial interests and statutory goals for SDRs differ from tensions for clearing agencies and SEFs? Is there a qualitative difference? Are potential tensions more or less attenuated for SDRs?

• How are potential tensions between commercial interests and statutory goals for SDRs similar to potential tensions for clearing agencies and SEFs? Would such similarities warrant similar restrictions regarding their governance arrangements and/or voting and ownership limitations?

• Are there any other restrictions or measures that the Commission should impose on SDRs to improve governance and mitigate any tensions between commercial interests and statutory goals at SDRs?

• Is it important that the Commission and the CFTC adopt compatible provisions regarding governance for SDRs? To what degree are SDRs registered with the Commission also likely to register as swap data repositories with the CFTC? Would incompatible or conflicting governance provisions provide significant difficulties for SDRs?

c. Third Core Principle: Rules and Procedures for Minimizing and Resolving Conflicts of Interest

As mentioned above, each SDR is statutorily required to establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest in the SDR's decisionmaking process and to establish a process for resolving any such conflicts of interest.[88] Based on information provided by industry representatives regarding how SDRs will likely operate, the Commission preliminarily believes that a small number of dealers could control SDRs, which may require SDR owners to balance competing interests.[89] Owners of an SDR could derive greater revenues from their non-repository activities in the SBS market than they would from sharing in the profits of the SDR in which they hold a financial interest. In addition, there may be a tension between an SDR's statutory obligations (*e.g.,* maintaining the privacy of data reported to the SDR) and its own commercial interests or those of its owners.[90]

A few entities that presently provide or anticipate providing repository services have identified conflicts of interest that could arise at an SDR. First, owners of an SDR could have commercial incentives to exert undue influence to control the level of access to the services offered and data maintained by the SDR and to implement policies and procedures that would further their self-interests to the detriment of others.[91] Specifically, owners of an SDR could exert their influence and control to prohibit or limit access to the services offered and data maintained by the SDR in order to

[88] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(7)(C)).

[89] *See* Office of the Comptroller of the Currency, Quarterly Report on Bank Trading and Derivatives Activities, First Quarter 2010 ("Derivatives activity in the U.S. banking system continues to be dominated by a small group of large financial institutions. Five large commercial banks represent 97% of the total banking industry notional amounts * * *.").

[90] *See, e.g.,* CPSS–IOSCO consultative report, *supra* note 55 (noting the conflicts of interest "between the unique public role of the [SDR] and its own commercial interests particularly if the [SDR] offers services other than recordkeeping or between commercial interests relating to different participants and linked market infrastructures and service providers").

[91] *See, e.g.,* Reval, Responses to the CFTC's Questions on the SDR Requirements (*available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/derivative9sub100110-reval.pdf*) (stating that an SDR with any ownership or revenue sharing arrangements directly or indirectly with a dealer would be an obvious conflict of interest) ("Reval Response Letter").

impede competition.[92] Second, an SDR could favor certain market participants over others with respect to the SDR's services and pricing for such services.[93] Third, an SDR could require that services be purchased on a "bundled" basis, as discussed above.[94] Finally, an SDR or a person associated with the SDR could misuse or misappropriate data reported to the SDR for financial gain.[95] As one repository noted, "SDR data is extremely valuable and could be sold either stand alone or enhanced with other market data and analysis. The use of this data in this matter would present competitive problems" as well as conflicts of interest issues.[96] Because these conflicts have been identified by only a few potential SDRs, the Commission recognizes that this information may not reflect all business models for SDRs. The Commission invites comment on this issue.

Proposed Rule 13n–4(c)(3) would provide general examples of conflicts of interest that should be considered by an SDR, including, but not limited to: (1) Conflicts between the commercial interests of an SDR and its statutory responsibilities, (2) conflicts in connection with the commercial interests of certain market participants or linked market infrastructures, third party service providers, and others, (3) conflicts between, among, or with persons associated with the SDR, market participants, affiliates of the SDR, and nonaffiliated third parties,[97] and (4) misuse of confidential information, material, nonpublic information, and/or intellectual property. Such conflicts of interest could limit the benefits of an SDR and undermine the mandatory reporting requirement in Exchange Act Section 13(m)(G), thereby impacting efficiency in the SBS market.[98]

Proposed Rule 13n–4(c)(3)(i) would require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decisionmaking process on an ongoing basis. The Commission preliminarily believes that requiring an SDR to conduct ongoing identification and mitigation of conflicts of interest is important because such conflicts can arise gradually over time or unexpectedly. Furthermore, a situation that is acceptable one day may present a conflict of interest the next. In order to identify and address potential conflicts that may arise over time, the Commission believes that, in general, an SDR's procedures should provide a means for regular review of conflicts as they impact the SDR's decisionmaking processes.

Proposed Rule 13n–4(c)(3)(ii) would require an SDR to recuse any person involved in a conflict of interest from the decisionmaking process for resolving any conflicts of interest. The Commission preliminarily believes that such recusal is necessary to eliminate an apparent conflict of interest in an SDR's decisionmaking process. Additionally, recusal would increase confidence in the SDR's decisionmaking process and avoid an appearance of impropriety.

Finally, proposed Rule 13n–4(c)(3)(iii) would require an SDR to establish, maintain, and enforce reasonable written policies and procedures regarding the SDR's non-commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person. The Commission recognizes that an SDR may have commercial incentives to operate as an SDR. To the extent that an SDR uses data that it receives from others for commercial purposes, the Commission preliminarily believes that such uses should be clearly defined and disclosed to market participants. If, for example, a market participant agrees to waive confidentiality of the data that it provides to an SDR, then, at the very least, the market participant should understand how an SDR is going to use that data and the scope of the market participant's waiver.

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed definition of "nonaffiliated third party" appropriate and sufficiently clear? If not, why not and how should it be defined?
- Are the Commission's proposed rules implementing the third core principle appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Are the Commission's examples of potential conflicts of interest in its proposed rules adequate? If not, are there other examples of conflicts that the Commission should identify in its rule?
- Do commenters agree with the potential conflict concerns that the Commission has identified in this release? How might conflicts of interest change as SDRs become more established? How might competitive forces within the SBS market affect or change current conflicts of interest? What potential new conflicts of interest could arise that the Commission should consider? Will competition potentially create different or additional conflicts of interest that the Commission should consider? Will competition potentially mitigate conflicts of interest?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- Should the Commission require an SDR to identify and mitigate conflicts of interest in an SDR's governance arrangements periodically rather than on an ongoing basis? Should the proposed requirement extend to any other circumstances?
- Is the Commission's proposed rule requiring recusal of any person involved in a conflict of interest appropriate and sufficiently clear? If not, what would be a better alternative?
- Is the Commission's proposed requirement relating to an SDR's non-commercial and commercial use of data

[92] *See, e.g.,* Warehouse Trust Company, Draft Response to CFTC re: CFTC Request for Information regarding SDR Governance (*available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/derivative9sub100510-wt.pdf*) (stating that "ownership of an SDR could lead to access restrictions on non-owners.") ("Warehouse Trust Response Letter").

[93] *See* Reval Response Letter, *supra* note 91 ("Preferential treatment in services provided by an SDR could also occur * * *.").

[94] *See* Warehouse Trust Letter, *supra* note 92 ("The issue of vertical bundling could arise where [SEFs and clearing agencies] have preferred access or servicing arrangements with SDRs primarily due to ownership overlaps.").

[95] *See* Reval Response Letter, *supra* note 91 ("There will always be an underlying conflict to ensure that the position information or client activity does not get into the hands of investors or an SDR business partner who could benefit from that information.").

[96] *See* Warehouse Trust Letter, *supra* note 92; *see also* Reval Response Letter, *supra* note 91 ("[I]f only one SDR is created for an asset class and that SDR is held by a market participant that could gain by having an edge on when the information is received, it could have a trading edge.").

[97] The term "nonaffiliated third party" of an SDR would be defined as any person except (1) the SDR, (2) an SDR's affiliate, or (3) a person employed by an SDR and any entity that is not the SDR's affiliate (and "nonaffiliated third party" includes such entity that jointly employs the person). *See* proposed Rule 13n–4(a)(8).

[98] *See* Public Law 111–203, § 763(i). Exchange Act Section 13(m)(G) imposes a mandatory reporting requirement, which provides that "[e]ach security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository."

appropriate and sufficiently clear? If not, why not and what would be a better alternative?

• Are there conflicts of interest specific to the commercial use of data by an SDR that the Commission should address? What are these conflicts? Can they be mitigated? If so, by what means?

• Should the Commission restrict or prohibit an SDR's use of data for commercial purposes? If so, in what way? For example, should the Commission prohibit an SDR's use of data for commercial purposes unless an SDR obtains express written consent from the market participants submitting such data? Should the Commission require that an SDR's policies and procedures require it to obtain consent from market participants before the SDR uses the data for any purpose or transmits such data to other parties other than regulators? Should the Commission require that an SDR's policies and procedures require it to obtain consent from market participants before the SDR provides aggregated SBS transaction data to the public without charge?

• If some commercial use of data is permitted, should particular commercial uses of data by an SDR nonetheless be prohibited? If so, which uses should be prohibited and why? Should certain potential uses of data, or the use of particular types of data, pose particular concern to the Commission? Which uses or data types are they, and how should the Commission respond?

• Should an SDR's affiliates be subject to any or all of the restrictions on commercial use that are imposed on an SDR? Should the Commission restrict the ability of an SDR to share data with any of its affiliates? For example, should an SDR be prohibited from sharing data with an affiliate unless the same data is also made available at the same time and on reasonable terms to market participants that are not affiliates? Should an SDR be prohibited from sharing certain types of data with an affiliate that trades SBSs?

• Would full disclosure by an SDR of its commercial use of data provide meaningful protection for market participants? Are market participants likely to have a meaningful choice to preclude the commercial use of their transaction data by choosing to report transactions to an SDR that does not make commercial use of the data? If commercial use of data is permitted, is it likely that any SDR would refrain from such use?

• What are the possible consequences of restricting or prohibiting an SDR's use of the data that it receives for commercial purposes? For example, would it deter persons from registering as SDRs? Would it result in existing SDRs to cease operating as such? Would prohibiting an SDR from making commercial use of data reported to it have positive benefits, such as enhancing the confidence of market participants that their trade or position information will not leak into the market?

• Would an SDR need to use data that it receives for commercial purposes in order to be a viable business? If so, explain.

• Are there any additional requirements that the Commission should impose to implement the third core principle?

E. Proposed Rule Regarding Data Collection and Maintenance

The Commission is proposing Rule 13n–5 under the Exchange Act to specify the data collection and maintenance requirements applicable to SDRs.[99]

1. Definitions

Proposed Rule 13n–5(a) would define terms used in the proposed rule. Proposed Rule 13n–5(a)(1) would define "transaction data" to mean all the information reported to the SDR pursuant to the Exchange Act and the rules and regulations thereunder.[100] This would include all information, including life cycle events, required to be reported to the SDR under Rule 901 of proposed Regulation SBSR.[101]

Proposed Rule 13n–5(a)(2) would define "position" as the gross and net notional amounts of open SBS transactions aggregated by one or more attributes, including, but not limited to, the (i) underlying instrument, index, or reference entity; (ii) counterparty; (iii) asset class; (iv) long risk of the underlying instrument, index, or reference entity; and (v) short risk of the underlying instrument, index, or reference entity.[102] Position data is required to be provided by SDRs to certain entities pursuant to Exchange Act Section 13(n)(5)(G).[103] Therefore, the Commission proposes defining the term, and has designed this definition to reflect the way the term is currently used in the industry.[104] The proposed term is designed to be sufficiently specific so that SDRs are aware of the types of position calculations that regulators may require an SDR to provide, while at the same time, provide enough flexibility to encompass the types of position calculations that regulators and the industry will find important as new types of SBS are developed.

Proposed Rule 13n–5(a)(3) would define "asset class" as "those security-based swaps in a particular broad category, including, but not limited to, credit derivatives, equity derivatives, and loan-based derivatives." The Commission is proposing this definition in order to implement proposed Rule 13n–5(b)(1)(ii), discussed below.

[99] Proposed Rule 13n–5 is being promulgated under Exchange Act Sections 13(n)(4)(B), 13(n)(7)(D), and 13(n)(9). *See* Public Law 111–203, § 763(i).

[100] In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(m)), the Commission is considering rules requiring an SDR to publicly disseminate certain SBS data that has been affirmed by the parties but has not necessarily been confirmed. *See* Regulation SBSR Release (proposed Rule 902), *supra* note 9. Any comments regarding the public dissemination proposed rules should be submitted in connection with that proposal. In another separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(n)(5)(E)), the Commission is considering rules that would require SDRs to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims. Any comments regarding the end-user clearing exemption proposed rules should be submitted in connection with that proposal.

[101] A definition of "life cycle event" is being proposed in proposed Regulation SBSR. *See* Regulation SBSR Release (proposed Rule 900), *supra* note 9.

[102] For purposes of this definition, positions aggregated by long risk would be only for the aggregate notional amount of SBSs in which a market participant has long risk of the underlying instrument, index, or reference entity. Similarly, positions aggregated by short risk would be only for the aggregate notional amount of SBSs in which a market participant has short risk of the underlying instrument, index, or reference entity. For SBSs other than credit default swaps, a counterparty has long risk where the counterparty profits from an increase in the price of the underlying instrument or index, and a counterparty has short risk where the counterparty profits from a decrease in the price of the underlying instrument or index. For credit default swaps, a counterparty has long risk where the counterparty profits from a decrease in the price of the credit risk of the underlying index or reference entity, and a counterparty has short risk where the counterparty profits from an increase in the price of the credit risk of the underlying index or reference entity. As market events require, the Commission may request that an SDR calculate positions in another manner and to provide those positions to the Commission on a confidential basis.

[103] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(5)(G)); *see also* proposed Rule 13n–4(b)(9).

[104] The Commission notes that Section 763(h) of the Dodd-Frank Act adds Exchange Act Section 10B, which provides, among other things, for the establishment of position limits for any person that holds SBSs. Specifically, Section 10B(a) provides that "[a]s a means reasonably designed to prevent fraud and manipulation, the Commission shall, by rule or regulation, as necessary or appropriate in the public interest or for the protection of investors, establish limits (including related hedge exemption provisions) on the size of positions in any security-based swap that may be held by any person." In addition, Exchange Act Section 10B(d) provides that the Commission may establish position reporting requirements for any person that effects transactions in SBSs, whether cleared or uncleared. *See* Public Law 111–203, § 763(h).

Proposed Rule 13n–5(b)(1)(ii) would require an SDR, if it accepts any SBS in a given asset class, to accept all SBSs in that asset class.

Request for Comment

The Commission requests comment on the following specific issues:

- Are these proposed definitions over-inclusive or under-inclusive? Is there some data that is captured by the term "transaction data" that should not be subject to the collection and maintenance requirements described below? Is there data that should be subject to these requirements that is not included in the proposed definition of "transaction data"?
- Is the proposed definition of "position" sufficiently precise?
- Are there other attributes of SBSs for which the Commission should specifically require SDRs to calculate positions?
- Exchange Act Section 10B authorizes the Commission to establish limits on the size of positions in any SBS that may be held by any person. Would the definition of "position" in proposed Rule 13n–5(a)(2) be appropriate for purposes of any rules the Commission might propose with regard to position limits?
- Is the proposed definition of "asset class" sufficiently precise? Is there another definition of "asset class" that better describes the broad categories of SBSs commonly referred to as credit derivatives, equity derivatives, and loan-based derivatives, but excluding those that are not SBSs?
- Should each SDR be allowed to define the "asset class" for which it will accept SBS transaction data under proposed Rule 13n–5(b)(1)(ii)?

2. Requirements

a. Transaction Data

Proposed Rule 13n–5(b)(1)(i) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of transaction data to the SDR, and would require the SDR to accept all transaction data that is reported to the SDR in accordance with such policies and procedures. A fundamental goal of Title VII is to have all SBSs reported to SDRs.[105] This proposed requirement would prevent SDRs from rejecting SBSs for arbitrary or anti-competitive reasons, minimize the number of SBSs that are not accepted by an SDR, and to the extent that the SDR's policies and procedures make clear what SBSs the SDR will accept, make it easier for market participants to determine whether there is an SDR that will accept a particular SBS.[106]

Proposed Rule 13n–5(b)(1)(ii) would require an SDR, if it accepts any SBS in a given asset class, to accept all SBSs in that asset class that are reported to it in accordance with its policies and procedures required by paragraph (b)(1) of the proposed rule. This proposed requirement is designed to maximize the number of SBSs that are accepted by an SDR. The Commission preliminarily believes that if certain SBSs are not accepted by any SDR and are reported to the Commission instead, the purpose of the Dodd-Frank Act to have centralized data on SBSs for regulators and others to access could be undermined. Without this requirement, the transaction costs for the Commission and other regulators to gather complete information on the SBS market could be higher. In addition, the Commission preliminarily believes that this proposed requirement would make it easier for market participants to determine whether there is an SDR that will accept a particular SBS.

However, an SDR would be required to accept only those SBSs from the asset class that are reported in accordance with the SDR's policies and procedures required by paragraph (b)(1) of this proposed rule.[107] For example, an SDR's policies and procedures could prescribe the necessary security and connectivity protocols that market participants must have in place prior to transmitting transaction data to the SDR. An SDR would not be required to accept transaction data from market participants that did not comply with these protocols; otherwise the transmission of the transaction data could compromise the SDR's automated systems.

To the extent that an SDR already has systems in place to accept and maintain SBSs in a particular asset class, the Commission preliminarily believes that the requirement of proposed Rule 13n–5(b)(1)(ii) would not add a material incremental financial or regulatory burden to SDRs. The Commission preliminarily believes that SDRs may have commercial incentives to limit SBSs for which they receive reports to those with relatively standardized terms, for operational reasons and because standardized instruments lend themselves more readily to aggregation of information that would have commercial value (to the extent that SDRs are entitled under the rules the Commission adopts to use such information for commercial purposes). Given these incentives, the requirement that, if an SDR accepts any SBS in a given asset class, it must accept all SBSs in that asset class, is meant to facilitate the aggregation of and access to SBS transaction data.

Proposed Rule 13n–5(b)(1)(iii) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself by reasonable means that the transaction data that has been submitted to the SDR is accurate. This proposed rule would also require SDRs to clearly identify the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of that transaction data.

Exchange Act Section 13(n)(5)(B) requires an SDR to "confirm with both counterparties to the security-based swap the accuracy of the data that was submitted."[108] This requirement is based on the premise that an SDR is useful only insofar as the data it retains is accurate.[109] SBS data that is not trusted does not enhance transparency. In order to ensure that the data submitted to an SDR is accurate and agreed to by both counterparties, the SDR must substantiate the accuracy of the data submitted with the counterparties. The Commission understands that with respect to certain asset classes, current market practice is for third party service providers to provide electronic confirmations prior to the SBS data reaching an SDR. The Commission preliminarily believes that an SDR would be able to fulfill its responsibilities under Exchange Act Section 13(n)(5)(B), proposed Rule 13n–4(b)(3),[110] and this proposed rule by

[105] *See* Exchange Act Section 13(m)(1)(G) requiring "[e]ach security-based swap (whether cleared or uncleared)" to be reported to a registered SDR. Public Law 111–203, § 763(i).

[106] In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act, the Commission is considering additional rules requiring an SDR to have policies and procedures relating to the reporting of SBS data to the SDR. *See* Regulation SBSR Release (proposed Rule 907), *supra* note 9. Any comments regarding the proposed reporting rules should be submitted in connection with that proposal.

[107] An SDR would be required to disclose to market participants its criteria for providing others with access to services offered and data maintained by the SDR pursuant to proposed Rule 13n–10(b)(1), as discussed in Section III.J of this release. Therefore, market participants would be aware of an SDR's policies and procedures for reporting data.

[108] *See also* proposed Rule 13n–4(b)(3).

[109] *See, e.g.,* CPSS–IOSCO, *supra* note 55 (the primary public policy benefit of an SDR is facilitated by the integrity of the information maintained by an SDR).

[110] Proposed Rule 13n–4(b)(3) would require SDRs to "[c]onfirm, as prescribed in Rule 13n–5, with both counterparties to the security-based swap the accuracy of the data that was submitted."

developing reasonable policies and procedures that rely on confirmations completed by another entity, such as an SB SEF, clearing agency, or third party vendor, as long as such reliance is reasonable. The SDR would have a continuing responsibility to oversee and supervise the performance of the third party confirmation provider. This could include having policies and procedures in place to monitor the third party confirmation provider's compliance with the terms of any agreements and to assess the third party confirmation provider's continued fitness and ability to perform the confirmations.

For example, if an SBS is traded on an SB SEF, that SB SEF would confirm the accuracy of the transaction data with both counterparties, and the SBS would then be reported to the SDR by the SB SEF. The SDR would not need to further substantiate the accuracy of the transaction data, as long as the SDR had a reasonable belief that the SB SEF had performed an accurate confirmation. However, the SDR would not comply with Exchange Act Section 13(n)(5)(B), proposed Rule 13n–4(b)(3), and this proposed rule if the confirmation proves to be inaccurate and the SDR had reason to know that its reliance on the SB SEF for providing accurate confirmations was unreasonable. If an SBS is transacted by two commercial end-users and is not electronically traded or cleared, and is reported to the SDR by one of those end-users, the SDR may not have any other entity that it can reasonably rely on, and may have to contact each of the counterparties itself to substantiate the accuracy of the transaction data.[111]

Transaction data may vary in terms of reliability. Some transaction data may have been affirmed by counterparties to an SBS, but not confirmed.[112] Some transaction data may have been confirmed informally by the back-offices of the counterparties, but not be considered authoritative. Other transaction data may have gone through an electronic confirmation process and be considered authoritative by the counterparties. In order for regulators to determine whether an SDR has reasonable policies and procedures for satisfying itself that the transaction data that has been submitted to the SDR is accurate, the SDR must document the processes used by third parties to substantiate the accuracy of the transaction data.

Proposed Rule 13n–5(b)(1)(iv) would require SDRs to record promptly the transaction data that it receives.[113] It is important that SDRs keep up-to-date records so that regulators and parties to SBSs will have access to accurate and current information.[114]

Request for Comment

The Commission requests comment on the following specific issues:

- What is the likely impact of these requirements on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for reporting SBSs to the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- Should the Commission require an SDR to have any particular substantive requirements in its policies and procedures, such as requirements pertaining to robust passwords for persons reporting transaction data?
- Does the definition of "asset class" in proposed Rule 13n–5(a)(3) provide sufficient guidance and clarity to entities that may register as SDRs and to other market participants?
- Should the Commission require an SDR to accept all SBSs of a given asset class? If not, what other mechanism should the Commission use to prevent "orphaned" SBSs? How should the Commission address SBSs that do not clearly belong to a particular asset class or that could arguably belong to more than one asset class? Should the Commission allow an SDR that accepts SBSs in one asset class to accept an SBS that arguably belongs to that asset class, but which could also belong to a second asset class, without requiring the SDR to then accept all SBSs in the second asset class?
- Will the requirement of proposed Rule 13n–5(b)(1)(ii) materially add to the costs of SDRs? How does this proposed requirement affect the possible business models under which an SDR may operate or the commercial viability of SDRs in general? Does it make any particular business model more or less attractive?
- Should the Commission impose other requirements that may increase access to an SDR, including:
  - Any other requirements that may prevent an SDR from rejecting those SBSs that are customized to such a degree that they are not in the SDR's economic interest to accept them because the SDR will not be able to perform downstream processing on the SBSs and may incur costs in obtaining the information to calculate positions; and
  - Requiring an SDR to employ technologies that accommodate a wide range of technological capabilities among persons that desire to report data to the SDR or other requirements that may prevent an SDR from rejecting SBSs from less sophisticated persons that do not engage in the volume of SBSs necessary to make it economically practicable to invest in technologies that are industry standards?
- Should the Commission require an SDR itself to substantiate the accuracy of the transaction data that has been submitted to the SDR?
- Should the Commission require an SDR to have any particular substantive requirements in its policies and procedures relating to these rules?
- Should the Commission give more guidance as to what constitutes reasonable reliance on a third party? For example, would it be reasonable to rely on documents provided by the party to an SBS that reports the SBS to an SDR? What if that party is a clearing agency that became a party to the SBS as the central counterparty?
- Where an SDR relies on a third party to provide confirmations, should the Commission give more guidance as

[111] The Commission preliminarily believes that an SDR should make reasonable accommodations, including consideration of any cost burdens, for a non-reporting counterparty of an SBS transaction in connection with any follow-up by the SDR regarding the accuracy of the counterparty's SBS transaction. These accommodations could, for example, include providing means for non-reporting counterparties to substantiate the accuracy of the transaction data without having to incur significant systems or technology costs.

[112] In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(m)), the Commission is considering rules requiring an SDR to publicly disseminate certain SBS data that has been affirmed by the parties but has not necessarily been confirmed. *See* Regulation SBSR Release (proposed Rule 902), *supra* note 9. Any comments regarding the public dissemination proposed rules should be submitted in connection with that proposal.

[113] In a separate proposal, the Commission is proposing rules prescribing the data elements that an SDR is required to accept for each SBS in association with requirements under Section 763(i) of the Dodd-Frank Act, adding Exchange Act Section 13(n)(4)(A), relating to standard setting and data identification. *See* Regulation SBSR Release (proposed Rule 901), *supra* note 9. Any comments regarding the data elements should be submitted in connection with that proposal.

[114] *See, e.g.,* CPSS–IOSCO, *supra* note 55 ("A [trade repository] should promptly record the trade information it receives from its participants. * * * Ideally, a [trade repository] should record to its central registry information it receives from its participants in real-time, and at a minimum, within one business day.").

to the oversight by the SDR of the third party? For example, how often should the SDR review the third party's confirmation procedures? Would annually be sufficient?

• Where an SDR is unable to reasonably satisfy itself that the transaction data is accurate, should the SDR reject the SBS? Should that SBS instead be reported to the Commission pursuant to Exchange Act Section 13A(a)(1)(B) and the rules and regulations promulgated thereunder?

• Should the Commission give more guidance as to whether an SDR (or the entity that it reasonably relies on) needs to get an affirmative response from both counterparties when it attempts to satisfy itself that the transaction data is accurate? Alternatively, should the SDR submit the transaction data to a counterparty, and require a response only if the counterparty disagrees with the transaction data? Would this answer change if the SBS is cleared or if the counterparty is an end-user?

• Should the Commission give more guidance as to whether receipt by an SDR of a confirmation under Exchange Act Section 15F(i)(2) and the rules promulgated thereunder would be sufficient to fulfill the SDR's duties under Exchange Act Section 13(n)(5)(B), proposed Rule 13n–4(b)(3), and this proposed rule?

• Should the term "promptly" be defined or should the Commission use another term such as "as soon as technologically practicable after the time at which the data has been submitted"?

• Should an SDR be required to record transaction data promptly after execution of a transaction or promptly after confirmation of the transaction?

b. Positions

Proposed Rule 13n–5(b)(2) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open SBSs for which the SDR maintains records. Position data is required to be provided by an SDR to certain entities pursuant to Exchange Act Section 13(n)(5)(G).[115] Position information is important to regulators for risk, enforcement, and examination purposes. In addition, having a readily available source of position information can be useful to counterparties themselves in evaluating their own risk. While much of the information necessary for an SDR to calculate positions (as defined in subsection (a)(2) of this proposed rule) will be reported to the SDR as transaction data, some information may not. For example, credit events for credit default swaps or events that result in the termination or adjustment to an equity swap may not be reported.[116] In order to meet its obligation to calculate positions, an SDR could require reporting parties to report such events or it could have a system that will monitor for and collect such information. In order for the positions to be calculated accurately, the SDR will need to promptly incorporate recently reported transaction data and collected unreported data. It is important that the SDR keep up-to-date records so that relevant authorities and parties to the SBS will have access to accurate and current information.[117]

Request for Comment

The Commission requests comment on the following specific issues:

• Should the Commission specify particular standards or procedures for calculating positions?

• What information will an SDR need to obtain in order to calculate positions and how difficult will it be to obtain?

• What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for reporting SBSs to the SDR?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

• The Commission understands that clearing agencies typically produce market values on cleared SBSs. However, many types of SBSs may not be cleared in the near term. Should the Commission require SDRs to calculate market values of each position at least daily and provide them to the Commission? In your comment, please consider the following:

○ What would be the benefits and burdens of such a requirement?

○ Should the requirement to calculate market values of positions be limited to certain types of SBSs, such as SBSs for which the counterparties have agreed that the transaction information maintained by the SDR is the primary record of the trade to the exclusion of any records held by the counterparties?

○ Should "market value" be defined, and if so, how?

○ Will the information necessary for calculating market values of the positions already be at the SDR? What information besides transaction data and positions will be required for the SDR to calculate the market values of positions? Would SDRs be able to obtain the necessary information to calculate market values? Why or why not? How could the SDR obtain the necessary information?

○ To the extent that other entities, such as SB SEFs, SBS dealers, or clearing agencies, already perform such calculations, would it be sufficient for the SDR to obtain the market values from such entity?

○ How frequently should such valuations be performed? Would daily valuation be too onerous for SDRs? What about weekly or monthly valuation?

○ Would market values be meaningful in assessing risk without knowing the margin calls and collateral posted? Should SDRs also be required to maintain margin call and collateral information?

○ How long should the SDR be required to maintain such market values? Would five years be adequate? What about the same time period as the Commission requires for positions?

c. Maintain Accurate Data

Proposed Rule 13n–5(b)(3) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are accurate. Maintaining accurate records is a core

[115] *See also* proposed Rule 13n–4(b)(9).

[116] In a separate proposal, the Commission is proposing rules prescribing the data elements that an SDR is required to accept for each SBS in association with requirements under Section 763(i) of the Dodd-Frank Act, adding Exchange Act Section 13(n)(4)(A), relating to standard setting and data identification. *See* Regulation SBSR Release (proposed Rule 901), *supra* note 9. The proposed definition of "life cycle event" in proposed Regulation SBSR states, "Notwithstanding the above, a life cycle event shall not include the scheduled expiration of the security-based swap, a previously described and anticipated interest rate adjustment (such as a quarterly interest rate adjustment), or other event that does not result in any change to the contractual terms of the security-based swap." *See* Regulation SBSR Release (proposed Rule 900), *supra* note 9. In order to calculate positions, SDRs may need this information, which would not be required to be reported to it. Any comments regarding the data elements should be submitted in connection with that proposal.

[117] *See, e.g.,* CPSS–IOSCO, *supra* note 55 ("Ideally, a [trade repository] should record to its central registry information it receives from its participants in real-time, and at a minimum, within one business day.").

function of an SDR.[118] Maintaining accurate records requires diligence on the part of an SDR; SBSs can be amended, assigned, or terminated and positions change upon the occurrence of new events (such as corporate actions). Therefore, it is important that an SDR has policies and procedures to ensure reasonably the accuracy of the transaction data and positions that it maintains. These policies and procedures could include portfolio reconciliation.[119]

Request for Comment

The Commission requests comment on the following specific issues:

- Should the Commission specify particular standards or procedures for maintaining accurate data, such as portfolio reconciliation and payment reconciliation?
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining SBSs at the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- If portfolio reconciliation and/or payment reconciliation is required, how often would it be done, and what should it entail? Would the following definition of portfolio reconciliation be sufficient: "a means of ensuring that the SDR's record of security-based swaps are synchronized with those of a person with open security-based swaps maintained by the SDR"? If not, how should the term be defined?

d. Data Retention

Proposed Rule 13n–5(b)(4) would require SDRs to maintain the transaction data for not less than five years after the applicable SBS expires and historical positions for not less than five years (i) in a place and format that is readily accessible to the Commission and other persons with authority to access or view such information; and (ii) in an electronic format that is non-rewriteable and non-erasable. A five-year retention period is the current requirement for the records of clearing agencies and other registered entities, and is the statutory requirement for SB SEFs.[120] Since an SBS transaction is ongoing, the transaction data should be maintained for the duration of the SBS and for five years after it expires. Positions are not tied to any particular SBS transaction; therefore, the Commission proposes to require positions, as required to be calculated pursuant to proposed Rule 13n–5(b)(2), to be maintained for five years, similar to the record retention requirement for clearing agencies.[121]

Alternatively, the Commission is considering requiring SDRs to "maintain transaction data for not less than five years after the applicable security-based swap expires or ten years after the applicable security-based swap is executed, whichever is greater, and historical positions for not less than five years." Some SBSs are, in practice, of very short duration due to various reasons, including being novated upon being submitted for clearing or being terminated through portfolio compression. By requiring SDRs to retain data of all SBSs for at least ten years after execution, regulators would be able to use the data of the SBSs for analytical studies.

The Commission proposes that the transaction data and positions be in a place and format that is readily accessible to the Commission and other persons with authority to access or view such information. The Commission preliminarily believes that this proposed requirement would ensure that SDRs maintain the information in an organized and accessible manner so that users can easily obtain the data that they need. The Commission also preliminarily believes that this proposed requirement would ensure that the information is maintained in a common and easily accessible format, such as a language commonly used in financial markets.[122]

The proposed requirement for information to be in an electronic format that is non-rewriteable and non-erasable is consistent with the record retention format applicable to electronic broker-dealer records.[123] This proposed requirement would prevent the maintained information from being modified or removed without detection.[124]

Request for Comment

The Commission requests comment on the following specific issues:

- Is the appropriate time period for the Commission to require an SDR to maintain transaction data at least five years after the applicable SBS expires and for positions at least five years? For transaction data, would ten years after expiration of the applicable SBS be more appropriate and why?[125] What would be the benefits and burdens associated with each of these time periods? Are there other retention periods that would be more appropriate?
- Should the Commission require SDRs to maintain transaction data for five years after the applicable SBS expires or ten years after the applicable SBS is executed, whichever is greater? What if the Commission required SDRs to maintain transaction data for five years after the applicable SBS expires or eight years after the applicable SBS is executed, whichever is greater? What would be the benefits and burdens associated with each of these time periods?
- Should the Commission instead require an SDR to maintain the transaction data and positions for an indefinite period? What would be the benefits and burdens of requiring an SDR to maintain such information indefinitely?
- Should the Commission have additional requirements regarding access to the transaction data and positions, such as requiring such

[118] *See* Section II, Role, Regulation, and Business Models of SDRs, of this release.

[119] *See, e.g.,* ISDA Operations Committee, Process Working Group, *Recommended Practices for Portfolio Reconciliation,* version 4.7 (Feb. 2006) (describing recommended practices for portfolio reconciliation).

[120] *See* Exchange Act Rule 17a–1, 17 CFR 240.17a–1 (for national securities exchanges, national securities associations, clearing agencies and the MSRB); Exchange Act Section 3D(d)(9), Public Law 111–203, § 763(c) (for SB SEFs).

[121] *See* Exchange Act Rule 17a–1, 17 CFR 240.17a–1 (requiring clearing agencies to retain data for five years).

[122] An example of such a format is Financial products Markup Language ("FpML"). FpML is based on XML (eXtensible Markup Language), the standard meta-language for describing data shared between applications.

[123] *See* Exchange Act Rule 17a–4(f)(2)(ii)(A), 17 CFR 240.17a–4(f)(2)(ii)(A). In Exchange Act Release No. 47806 (May 7, 2003), 68 FR 25281 (May 12, 2003), the Commission stated, among other things, that a broker-dealer would not violate Exchange Act Rule 17a–4(f)(2)(ii)(A) "if it used an electronic storage system that prevents the overwriting, erasing or otherwise altering of a record during its required retention period through the use of integrated hardware and software control codes." The Commission is proposing to incorporate this interpretation into proposed Rule 13n–5(b)(4).

[124] Records made or kept by an SDR, other than transaction data and positions, will be governed by proposed Rule 13n–7, as discussed in Section III.G of this release.

[125] The European Commission has recently proposed that trade repositories maintain reported data "for at least ten years following the termination of the relevant contracts." *See* European Commission, *Proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories* (2010) (*available at http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/20100915_proposallowbar;en.pdf*).

information be maintained on a server in the United States?

• What is the likely impact of these requirements on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for reporting and maintaining transaction data?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

• Should the Commission require such information be kept in a particular format that is accessible to the Commission, such as in FpML? Alternatively, if the Commission does not want to specify a particular technology, should it require such information be maintained in "a global standard for data modeling" or other standard? Should the Commission require that all SDRs maintain such information in the same format?

• Should the Commission require that SDRs establish and maintain effective interoperability and interconnectivity with other SDRs, market infrastructures, and venues?

• Should the Commission specifically require the SDR to organize and index accurately the transaction data and positions so that the Commission and other users of such information are easily able to obtain the specific information that they require?

• Is the proposed requirement that transaction data and positions be kept in a non-rewriteable and non-erasable format too restrictive? Are there other alternatives for protecting the accuracy of such information over the time period that such information is required to be maintained?

• Should the Commission require SDRs to verify automatically the quality and accuracy of the storage media recording process? Should the Commission require SDRs to serialize the original and, if applicable, duplicate units of storage media, and time-date for the required period of retention the information placed on such electronic storage media? Should the Commission require SDRs to have in place an audit system providing for accountability regarding inputting of records required to be maintained and preserved pursuant to this section and inputting of any changes made to every original and duplicate record maintained and preserved thereby? [126]

e. Controls To Prevent Invalidation

Proposed Rule 13n–5(b)(5) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR. Based on staff discussions with market participants, the Commission understands that SDRs, through their process of substantiating the accuracy of the data or in their user agreements, may, and without the knowledge of the counterparties, cause the modification of terms of an SBS. SBSs can be highly negotiated between the counterparties, and the Commission preliminarily believes these terms should not be modified or invalidated without the full consent of the counterparties.

Request for Comment

The Commission requests comment on the following specific issues:

• Should the Commission establish more specific requirements to avoid contract invalidation by an SDR?

• What is the practical effect of this proposed requirement?

• Are such modifications actually occurring?

• What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs and the willingness of persons to register as SDRs?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

f. Dispute Resolution Procedures

Proposed Rule 13n–5(b)(6) would require every SDR to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions maintained by the SDR.[127] The data maintained by the SDR will be used by regulators to make assessments about counterparties, such as whether the counterparty is a major SBS participant. The counterparties also will use this data, and in some cases the data maintained by the SDR may be considered by the counterparties to be the legal record of the SBS. Counterparties, therefore, should have the ability to dispute the accuracy of the data regarding their SBSs held at the SDR. Providing the means to resolve such disputes should enhance data quality and integrity.

Request for Comment

The Commission requests comment on the following specific issues:

• Should the Commission require an SDR to have any particular requirements in its dispute resolution procedures under this rule?

• Is dispute resolution a necessary service that must be provided by an SDR?

• What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs and the willingness of persons to register as SDRs?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

g. Data Preservation After an SDR Ceases To Do Business

Proposed Rule 13n–5(b)(7) would require an SDR, if it ceases to do business, or ceases to be registered pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, to continue to preserve, maintain, and make accessible the transaction data and historical positions required to be collected, maintained, and preserved by the rule in the manner required by the Exchange Act and the rules and regulations thereunder (including in a place and format that is readily accessible to the Commission and other persons with authority to access or view such information, in an electronic format that is non-rewriteable and non-erasable, and in a manner that protects confidentiality and accuracy)

[126] These requirements are consistent with the broker-dealer retention requirements. *See* Exchange Act Rule 17a–4(f), 17 CFR 240.17a–4(f).

[127] In a separate proposal, the Commission is proposing rules regarding the correction of errors in SBS information maintained by an SDR in association with requirements under Section 763(i) of the Dodd-Frank Act. *See* Regulation SBSR Release (proposed Rules 905 and 907(a)(3)), *supra* note 9. Any comments regarding those proposed rules should be submitted in connection with that proposal.

for the remainder of the period required by this rule (that is, not less than five years after the applicable SBS expires for transaction data and not less than five years for historical positions).[128] Given the importance of the records maintained by an SDR to the functioning of the SBS market, if an SDR ceases to do business, this could cause serious disruptions in the market should the information it maintains become unavailable.

Request for Comment

The Commission requests comment on the following specific issues:

- Should the Commission propose other requirements that might be necessary or useful in protecting the information maintained by an SDR if the SDR ceases to do business?
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining SBS data at the SDR?

h. Plan for Data Preservation

Proposed Rule 13n–5(b)(8) would require an SDR to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with proposed Rule 13n–5(b)(7), which shall include procedures for transferring the transaction data and positions to the Commission or its designee (including another registered SDR). Given the importance of the records maintained by an SDR to the functioning of the SBS market, if an SDR ceases to do business, the absence of a plan to transfer information could cause serious disruptions. The Commission preliminarily expects that an SDR's plan would establish procedures and mechanisms so that another entity would be in the position to maintain this information after the SDR ceases to do business.

Request for Comment

The Commission requests comment on the following specific issues:

- Should the Commission propose other requirements that might be necessary or useful in protecting the information maintained by an SDR if the SDR ceases to do business?
- To what extent does this requirement provide additional protections beyond those of proposed Rule 13n–5(b)(7)?
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining SBS data at the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

F. Proposed Rule Regarding Automated Systems

The Commission is proposing Rule 13n–6 under the Exchange Act to provide standards for SDRs with regard to their automated systems' capacity, resiliency, and security.[129] The standards being proposed under this rule are comparable to the standards applicable to self-regulatory organizations ("SROs"), including exchanges and clearing agencies,[130] and certain other entities, including significant-volume alternative trading systems ("ATSs") [131] and market information dissemination systems,[132] pursuant to the Commission's Automation Review Policy ("ARP") standards. To promote the maintenance of a stable and orderly SBS market, the Commission preliminarily believes that SDRs should be required to meet the same capacity, resiliency, and security standards applicable to SROs and certain other entities under the Commission's current ARP program.[133]

Systems failures can limit access to data, call into question the integrity of data, and prevent market participants from being able to report transaction data, and thereby have a large impact on market confidence, risk exposure, and market efficiency. Proposed Rule 13n–6 would require an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, resiliency, and security; and submit to the Commission annual reviews of its automated systems, systems outage notices, and prior notices of planned system changes.

These proposed requirements essentially codify and parallel the ARP requirements that have been in place for almost twenty years. The staff has found these standards to be effective in overseeing the capacity, resiliency, and security of major automated systems in use in the securities markets. These proposed requirements as applied to the SBS market are designed to prevent and minimize the impact of systems failures that might negatively impact the stability of the SBS market.

1. Requirements for SDRs' Automated Systems

a. Policies and Procedures

Proposed Rule 13n–6(b)(1) would require an SDR to "establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, resiliency, and security. Such policies and procedures shall, at a minimum:

(i) Establish reasonable current and future capacity estimates;

(ii) Conduct periodic capacity stress tests of critical systems to determine such systems' ability to process transactions in an accurate, timely, and efficient manner;

(iii) Develop and implement reasonable procedures to review and keep current its system development and testing methodology;

(iv) Review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters; and

(v) Establish adequate contingency and disaster recovery plans."

This list of proposed requirements is based on existing ARP requirements applied to significant-volume ATSs

[128] This proposed requirement is based on Exchange Act Rule 17a–4(g), 17 CFR 240.17a–4(g), which applies to broker-dealer books and records.

[129] Proposed Rule 13n–6 is being promulgated under Exchange Act Sections 13(n)(4)(B), 13(n)(7)(D), and 13(n)(9). *See* Public Law 111–203, § 763(i).

[130] *See* Exchange Act Release No. 27445 (Nov. 16, 1989), 54 FR 48703 (Nov. 24, 1989) ("ARP I Release"); Exchange Act Release No. 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991) ("ARP II Release").

[131] *See* Rule 301(b)(6) of Regulation ATS, 17 CFR 242.301(b)(6); Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 1998).

[132] *See* ARP II Release, 56 FR 22490, *supra* note 130 (the Commission's ARP policies "encompass SRO systems that disseminate transaction and quotation information"); *See also* ARP I Release, 54 FR 48703, *supra* note 130 (discussing that "the SROs have developed and continue to enhance automated systems for the dissemination of transaction and quotation information").

[133] Clearing agencies are SROs and are therefore subject to the Commission's Automation Review Policies. The Dodd-Frank Act requires that the data maintenance standards of SDRs "shall be comparable to the data standards imposed by the Commission on clearing agencies in connection with their clearing of security-based swaps." Exchange Act Section 13(n)(4)(C), Public Law 111–203, § 763(i). Proposed Rule 13n–6 will impose data maintenance standards on SDRs that are comparable to those imposed by the Commission on clearing agencies by applying the ARP standards to them.

under Rule 301(b)(6) of Regulation ATS.[134] In addition, the Commission has applied these requirements to SROs and other entities in the securities markets for a number of years in the context of its ARP inspection program.

As a general matter, the Commission preliminarily believes that, if an SDR's policies and procedures satisfy industry best practices standards, then these policies and procedures would be adequate for purposes of proposed Rule 13n–6(b)(1). However, in the unlikely event that industry best practices standards of widely recognized professional organizations are not consistent with the public interest, protection of investors, or the maintenance of fair and orderly markets, the Commission staff would have flexibility to establish such standards.[135]

The proposed rule would require an SDR to quantify, in appropriate units of measure the limits of the SDR's capacity to receive (or collect), process, store, or display the data elements included within each function, and identify the factors (mechanical, electronic, or other) that account for the current limitations.[136] This will make it easier for the Commission to detect any potential capacity constraints of an SDR, which, if left unaddressed, could compromise the ability of an SDR to collect and maintain SBS data. An SDR's failure to clearly understand and have procedures to address its capacity limits would increase the likelihood that it would experience a loss or disruption of system operations.

b. Objective Review of Automated Systems

Proposed Rule 13n–6(b)(2) would require an SDR to submit an objective review of its systems that support or are integrally related to the performance of its activities to the Commission, on an annual basis, within thirty calendar days of completion. This proposed requirement is drawn from the ARP II Release.[137] This proposed requirement is critical to help ensure that SDRs have adequate capacity, resiliency, and security and that their automated systems are not subject to critical vulnerabilities. Proposed Rule 13n–6(a)(3) would define "objective review" as "an internal or external review, performed by competent, objective personnel following established procedures and standards, and containing a risk assessment conducted pursuant to a review schedule."[138] The proposed definition of "objective review" in proposed Rule 13n–6(a)(3) is based on the standard for the review of automated systems set forth in the ARP II Release.[139]

As in the current ARP program, the Commission staff preliminarily believes that a reasonable basis for determining that a review is objective for purposes of proposed Rule 13n–6 is if the level of objectivity of an SDR's reviewers complied with standards set by widely recognized professional organizations.[140] However, in the unlikely event that industry best practices standards of widely recognized professional organizations are not consistent with the public interest, protection of investors, or the maintenance of fair and orderly markets, the Commission staff would have flexibility to establish such standards.

The decision on which type of reviewer, an internal department or an external firm, should perform the review is a decision for each SDR to make. The Commission preliminarily believes that, as long as the reviewer has the competence, knowledge, consistency, and objectivity sufficient to perform the role, the review can be performed by either recognized information technology firms or by a qualified internal department knowledgeable of information technology systems.

Proposed Rule 13n–6(b)(2) would further require that, where the objective review is performed by an internal department, an objective, external firm must assess the internal department's objectivity, competency, and work performance with respect to the review performed by the internal department. Proposed Rule 13n–6(b)(2) would require that the external firm issue a report of that review, which the SDR must submit to the Commission on an annual basis, within thirty calendar days of completion of the review.

The proposed requirement in proposed Rule 13n–6(b)(2) that an SDR submit an annual objective review to the Commission is drawn from the ARP II Release.[141] In addition, the proposed requirement in proposed Rule 13n–6(b)(2) that, where the objective review is performed by an internal department, an objective, external firm must assess the internal department's objectivity, competency, and work performance, is similarly drawn from the ARP II Release.[142]

The proposed annual review would not be required to address each element contained in proposed subsections (i)–(v) of Rule 13n–6(b)(1) every year. Rather, using its own risk assessment, an SDR's reviewer would review each element on a "review schedule," as defined in proposed Rule 13n–6(a)(5), in which each element would be assessed at specific, regular intervals, thus facilitating systematic and timely review of each element. This should provide a reasonable and cost-effective level of assurance that automated systems of SDRs are being adequately developed and managed with respect to capacity, security, development, and contingency planning concerns.

The proposed requirement to submit an objective review within thirty days of completion assures the Commission will have timely notice of the information required. The Commission has found through its experience with the current ARP program for SROs and other entities in the securities market that an entity generally requires approximately thirty calendar days after completion of the review to complete the internal review process necessary to submit an annual review to the Commission. A shorter timeframe might not provide an SDR with sufficient time to complete its internal review of the document; a longer timeframe might serve to encourage unnecessary delays.

c. Material Systems Outages

Under proposed subsection (3) of Rule 13n–6(b), an SDR would be required to promptly notify the Commission of material systems outages and any remedial measures that have been implemented or are contemplated,

[134] *See* 17 CFR 242.301(b)(6).

[135] Industry best practices standards currently are established by organizations such as: The Information Systems Audit and Control Foundation ("ISACF"); the Federal Financial Institutions Examination Council's ("FFIEC"); the Institute of Internal Auditors ("IIA"); and the SANS Institute.

[136] Use of such appropriate units of measure is required in proposed Form SDR Item 31. *See also* Form SIP, Item #27 for SIPs. 17 CFR 249.1001.

[137] *See* ARP II Release, 56 FR 22490, *supra* note 130.

[138] Proposed Rule 13n–6(a)(4) would define "competent, objective personnel" as "a recognized information technology firm or a qualified internal department knowledgeable of information technology systems." This proposed definition is based on the standard for reviewers of automated systems set forth in the ARP II Release. *See* ARP II Release, 56 FR 22490, *supra* note 130. Proposed Rule 13n–6(a)(5) would define "review schedule" as "a schedule in which each element contained in subsection (b)(1) of this Rule 13n–6 would be assessed at specific, regular intervals." This proposed definition codifies the Commission's policy set forth in the ARP II Release. *See* ARP II Release, 56 FR 22490, *supra* note 130.

[139] *See* ARP II Release, 56 FR 22490, *supra* note 130.

[140] Such standards are currently established by organizations such as the IIA, the Information Systems Audit and Control Association ("ISACA") (formerly the Electronic Data Processing Auditors Association ("EDPAA")), and the American Institute of Certified Public Accountants ("AICPA").

[141] *See* ARP II Release, 56 FR 22490, *supra* note 130.

[142] *See id.*

including (i) immediately notifying the Commission when a material systems outage is detected; (ii) immediately notifying the Commission when remedial measures are selected to address the material systems outage; (iii) immediately notifying the Commission when the material systems outage is addressed; and (iv) submitting to the Commission within five business days of when the material systems outage occurred a detailed written description and analysis of the outage and any remedial measures that have been implemented or are contemplated.

This subsection would codify the procedures followed by SROs and certain other entities under the Commission's current ARP program in providing the staff with notification of material system outages. In particular, proposed subsection (3) would clarify that the Commission expects to receive immediate notification that an outage has been detected, that remedial measures have been selected to address the outage, and that the outage has been addressed. Proposed subsection (3) would also clarify that an SDR should submit a detailed written description and analysis of the outage within five business days of the occurrence of the outage.

The Commission preliminarily believes that the proposed rule would assist the Commission in assuring that an SDR has diagnosed and is taking steps to correct system disruptions, so that systems of the SDR are reasonably equipped to accept and securely maintain transaction data. The Commission preliminarily believes that requiring an SDR to submit notifications of material system outages to the Commission is essential to help ensure that the Commission can continue to effectively oversee the SDR.

Proposed Rule 13n–6(a)(1) would define "material systems outage" as an unauthorized intrusion into any system, or an event at an SDR involving systems or procedures that results in (i) a failure to maintain service level agreements or constraints;[143] (ii) a disruption of normal operations, including switchover to back-up equipment with no possibility of near-term recovery of primary hardware; (iii) a loss of use of any system; (iv) a loss of transactions; (v) excessive back-ups or delays in processing; (vi) a loss of ability to disseminate transaction data, or positions;[144] (vii) a communication of an outage situation to other external entities; (viii) a report or referral of an event to the SDR's board or senior management; (ix) a serious threat to systems operations even though systems operations were not disrupted; (x) a queuing of data between system components or queuing of messages to or from customers of such duration that a customer's normal service delivery is affected; or (xi) a failure to maintain the integrity of systems that results in the entry of erroneous or inaccurate transaction data or other information in the SDR or the securities markets.

Based on its experience in requiring SROs and other entities to report material systems outages in the context of the current ARP program, the Commission preliminarily believes that this definition is appropriate for SDRs. The Commission preliminarily believes that each of the events listed in paragraphs (i) through (xii) of proposed Rule 13n–6(a)(1) are significant events that warrant reporting to the Commission because such material systems outages could negatively impact the stability of the SBS market. The application of the proposed definition is relatively straightforward, and it focuses on the types of events that the Commission preliminarily believes should require notification to the Commission under proposed Rule 13n–6(b)(3), so that the Commission can respond appropriately to the event that caused the loss or disruption.

Specifically, the Commission preliminarily believes that proposed subsections (i), (ii), (iii), (iv), and (v) address events that cause a significant loss or disruption of normal system operations sufficient to warrant notification to the Commission. In addition, the Commission preliminarily believes that proposed subsection (vi) addresses a type of event that impairs transparency or accurate and timely regulatory reporting.

The Commission also preliminarily believes that proposed subsections (vii) and (viii) are appropriate because communications of an outage to entities outside of the SDR, the board, or senior management are indicia of a significant system outage sufficient to warrant notification to the Commission. Specifically, proposed subsection (viii)'s reference to "a report or referral of an event * * *" seeks to address situations in which an SDR might seek to apply an overly narrow definition of an "outage situation" in proposed subsection (vii), in order to avoid reporting a problem that nevertheless has a significant impact on the performance of the SDR's systems and therefore warrants reporting to the Commission. For example, where an SDR experiences a slowing, but not a stoppage, of its ability to accept transaction data, and that slowing of data acceptance is sufficiently significant to have been reported or referred to the SDR's board or senior management, the Commission preliminarily believes that this situation would constitute a material system outage under proposed subsection (viii) that must be reported to the Commission. By including proposed subsection (viii) in the definition of "material system outage," the Commission seeks to ensure that it is informed of events that most entities subject to current ARP standards would already understand should be covered under the current program. This should permit the Commission to effectively monitor the operation of SDRs' automated systems. The Commission preliminarily believes that proposed subsections (ix) and (x) are appropriate because threats to system operations and queuing of data are events that may result in a significant disruption of normal system operations warranting notification to the Commission.

Subsection (xi) covers a failure to maintain the integrity of systems that results in the entry of erroneous or inaccurate transaction data or other information in an SDR or to market participants. This subsection is designed to address the unique role of SDRs in the SBS market. In particular, it is intended to cover such events as breakdowns in an SDR's internal controls that result in the entry of erroneous orders into the market. For example, it is possible that an SDR could, while in the process of testing its systems, inadvertently retain "test" data in its database. This, in turn, could result in erroneous reporting of SBSs to the Commission, other regulators, and counterparties. Counterparties may become uncertain of their positions, leading to market disruptions. This, in turn, could erode investor confidence in the integrity of the SBS market, damaging liquidity and impeding the capital formation process. Accordingly, the Commission preliminarily believes that this type of breakdown in an SDR's

[143] A service level agreement is a contract between a third party that manages and distributes software-based services and a customer, which commits the third party to a required level of service. A service level agreement should contain a specified level of service, support options, enforcement or penalty provisions for services not provided, a guaranteed level of system performance regarding downtime or uptime, a specified level of customer support, and indicate what software or hardware will be provided and for what fee.

[144] Proposed Rule 13n–6(a)(6) would give the term "transaction data" the same meaning as in proposed Rule 13n–5(a)(1). Proposed Rule 13n–6(a)(7) would give the term "position" the same meaning as in proposed Rule 13n–5(a)(2). *See* Section III.E.1 of this release for the discussion of these definitions.

systems controls should be reported to the Commission.

By including proposed subsection (xi) in the definition of "material system outage," the Commission is seeking to ensure that it is informed of events that could negatively impact the integrity of systems that result in the entry of erroneous or inaccurate transaction data or other information in an SDR or the securities markets. This should permit the Commission to monitor effectively the operation of each SDR's automated systems.

The definition of material systems outage also includes an unauthorized intrusion by outside persons, insiders, or unknown persons, into any system. The Commission preliminarily believes that this provision would permit the Commission to effectively monitor the operation of SDR's automated systems by requiring SDRs to notify the Commission of unauthorized intrusions into systems or networks. SDRs would need to immediately report unauthorized intrusions regardless of whether the intrusions were part of a cyber attack; potential criminal activity; other unauthorized attempts to retrieve, manipulate, or destroy data or to disrupt or destroy systems or networks; or any other malicious activity affecting data, systems, or networks. If unauthorized intrusions were successful in breaching systems or networks, SDRs would need to report these intrusions even if the parties conducting the unauthorized intrusion were unsuccessful in achieving their apparent goals (such as the introduction of malware or other means of disrupting or manipulating data, systems, or networks). SDRs would need to supplement their initial reports by sending the Commission updates on any harm to data, systems, or networks as well as any remedial measures that the SDRs are contemplating or undertaking to address the unauthorized intrusions. SDRs, however, would not need to report unsuccessful attempts at unauthorized intrusions that did not breach systems or networks.

The Commission preliminarily believes that the proposed five business day requirement regarding submission of a written description of material system outages is an appropriate time period. In the Commission's experience with the current ARP program for SROs and other entities in the securities market, an entity generally requires approximately five business days after the occurrence of a material system outage to gather all the relevant details regarding the scope and cause of the outage. A shorter timeframe might not provide sufficient time for the SDR to gather all relevant details surrounding the outage and describe them in a written submission; a longer timeframe might encourage unnecessary delays.

d. Material Systems Changes

Under proposed subsection (4) of Rule 13n–6(b), an SDR would be required to notify the Commission in writing at least thirty calendar days before implementation of any planned material systems changes. This proposed requirement is drawn from the ARP II Release.[145]

Proposed Rule 13n–6(a)(2) would define "material systems change" as "a change to automated systems that: (i) Significantly affects existing capacity or security; (ii) in itself, raises significant capacity or security issues, even if it does not affect other existing systems; (iii) relies upon substantially new or different technology; (iv) is designed to provide a new service or function; or (v) otherwise significantly affects the operations of the security-based swap data repository." Based on its experience in requiring SROs and other entities to report material systems changes in the context of the current ARP program, the Commission preliminarily believes that this definition is appropriate for SDRs. Each of the events listed in paragraphs (i) through (v) are significant events that warrant reporting to the Commission because any of those events can lead to a material systems outage that could negatively affect the stability of the SBS market. The application of the proposed definition is relatively straightforward, and it focuses on the types of events that should require notification to the Commission under proposed Rule 13n–6(b)(2). Specifically, the proposed subsections (i)—(iv) are events that concern the adequacy of capacity estimates, testing, and security measures taken by an SDR, and thus are sufficiently significant to warrant notification to the Commission. Proposed subsection (v) covering a change that "otherwise significantly affects the operations of the security-based swap data repository" is more open-ended in order to require notification of other major systems changes. Examples of changes that fall within proposed subsection (v) include, but are not limited to: major systems architectural changes; reconfigurations of systems that cause a variance greater than five percent in throughput or storage;[146] introduction of new business functions or services; material changes in systems; changes to external interfaces; changes that could increase susceptibility to major outages; changes that could increase risks to data security; changes that were, or will be, reported to or referred to an SDR's board or senior management; and changes that may require allocation or use of significant resources.

The Commission preliminarily believes that the proposed thirty calendar day requirement regarding pre-implementation written notification to the Commission of planned material systems changes is an appropriate time period. The Commission has found through its experience with the current ARP program that this amount of time is necessary for the Commission staff to evaluate the issues raised by a planned material systems change. A shorter timeframe might not provide sufficient time for the Commission staff to analyze the issues raised by the systems change; a longer timeframe might unnecessarily delay the covered entity in implementing the change.

Request for Comment

The Commission requests comment on the following specific issues:

- Should the Commission consider imposing other requirements or standards? Should any of the proposed requirements be eliminated or refined? If so, please explain your reasoning.
- Are there factors specific to SBS transactions that would make applying a system that is traditionally used in the equity markets inappropriate?
- What is the likely impact of these requirements on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining SBS data at the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- Should the Commission expressly require by rule:
  - An SDR's contingency and disaster recovery plans (required in proposed paragraph (b)(1)(v)) to be tested

[145] *See* ARP II Release, 56 FR 22490, *supra* note 130.

[146] The Commission has identified the five percent threshold as triggering the definition of "material systems change" in proposed Rule 13n–6(a)(2) because, based on experience in administrating the ARP program in the equities markets for almost twenty years, it believes that reconfigurations that exceed five percent in throughput or storage typically have the greatest potential to cause significant disruptions to automated systems.

periodically to assure their effectiveness and adequacy? [147]

○ An SDR's contingency and disaster recovery plans (required in proposed paragraph (b)(1)(v)) to cover at a minimum:

• Preparation for contingencies through such devices as appropriate remote and on-site hardware back-up and periodic duplication and off-site storage of data files?

• Off-site storage of up-to-date, duplicative software, files and critical forms and supplies need for processing operations, including a geographically diverse back-up site that does not rely on same infrastructure components (*e.g.,* transportation, telecommunications, water supply, and electric power) as the SDR primary operations center?

• Immediate availability of software modifications, detailed procedures, organizational charts, job descriptions, and personnel for the conduct of operations under a variety of possible contingencies?

• Emergency mechanisms for establishing and maintaining communications with participants, regulators and other entities involved? [148]

○ An SDR's contingency and disaster recovery plans (required in proposed paragraph (b)(1)(v)) to include resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as an SDR, including, without limitation, the duties set forth in Rule 13n–4, following any disruption of its operations? [149] If so, what should the recovery time objective be? Should the SDR's contingency and disaster plans (required in proposed paragraph (b)(1)(v)) and resources generally enable resumption of the SDR's operations and resumption of ongoing fulfillment of the SDR's duties and obligations during the next business day following the disruption?

○ An SDR, to the extent practicable, to coordinate its contingency and disaster recovery plans (required in proposed paragraph (b)(1)(v)) with those of the SB SEFs, SBS markets, clearing agencies, SBS dealers, and major SBS participants who report transaction data to the SDR, and with those of regulators identified in Exchange Act Section 13(n)(5)(G), with a view to enabling effective resumption of the SDR's operations, including programs for periodic, synchronized testing of these plans?

○ An SDR, in developing its contingency and disaster recovery plans, to take into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers?

○ An SDR, if it offers services in addition to acting as a SDR, to establish, maintain, and enforce written policies and procedures reasonably designed to assure that the additional services do not adversely impact the operational reliability of its core function as an SDR? [150]

○ An SDR to identify the potential risks that can arise as a result of interoperability and/or interconnectivity with other market infrastructures and venues from which data can be submitted to the SDR (such as exchanges, SB SEFs, clearing agencies, SBS dealers, and major SBS participants) and service providers and how the SDR mitigates such risks? [151]

○ An SDR to abide by substantive requirements (in addition to, or in place of, the policies and procedures approach of proposed Rule 13n–6(b)(1)), such as (i) having robust system controls and safeguards to protect the data from loss and information leakage, (ii) having high-quality safeguards and controls regarding the transmission, handling, and protection of data to ensure the accuracy, integrity, and confidentiality of the trade information recorded in the SDR, or (iii) having reliable and secure systems and having adequate, scalable capacity? and

○ An SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data that it accepts is from the entity it purports to be from, such as requiring robust passwords?

• Are the time periods specified in proposed Rule 13n–6(b)(2)–(4) with respect to submission of annual reviews and written notices of material system outages and material systems changes the correct time periods to use? Should any of the proposed time periods be shortened or lengthened? Should the time periods be replaced with less specific requirements, such as "promptly" or "timely"? If so, please explain your reasoning.

• Should the Commission require the notification required by proposed Rule 13n–6(b)(4) to be sufficiently detailed to explain the new system development process, the new configuration of the system, its relationship to other systems, the timeframes or schedule for installation, any testing performed or planned, and an explanation on the impact of the change on the SDR's capacity estimates, contingency protocols and vulnerability estimates? [152]

• Are there specific provisions in the proposed definitions that should be eliminated or refined? Are there some events which should be included in the definitions of "material systems outage" and "material systems change" that are not, or events that should not be included in these definitions but are? If so, please explain your reasoning.

• Should the Commission require the use of a specific framework by outside or inside parties for evaluating whether SDRs have adequate capacity, resiliency, and security and that their automated systems are not subject to critical vulnerabilities? If so, what would the critical components of the framework include? Are existing frameworks available that are suitable for this purpose and, if so, which ones would be considered appropriate?

• Are the definitions "objective review" and "competent, objective personnel" parallel to the requirements for SROs and other entities in the securities markets in the context of the current ARP program?

• Should the objective review required in proposed Rule 13n–6(b)(2) be done on a regular, periodic basis, rather than on an annual basis?

• Is the requirement in proposed Rule 13n–6(b)(2) for an objective, external firm to assess the objectivity, competency, and work performance of an internal department that performed an objective review necessary or appropriate? If the objective review is done by an internal department, should the Commission require that it be done by a department or persons other than

[147] This requirement would be similar to what is required of clearing agencies. *See* Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920 (June 20, 1980).

[148] These requirements are similar to requirements related to disaster recovery plans of clearing agencies. *See id.* The requirement for geographical diversity is currently applicable to securities firms. *See* Exchange Act Release No. 47638 (April 7, 2003), 68 FR 17809 (April 11, 2003) (the "BCP Whitepaper").

[149] For example, the BCP Whitepaper requires clearing and settlement organizations to have a recovery time objective of "within the business day on which the disruption occurs with the overall goal of achieving recovery and resumption with two hours after an event."

[150] *See, e.g.,* CPSS–IOSCO, *supra* note 55 ("Where a [trade repository] offers services in addition to its record keeping function, or considers doing so, it should ensure that it has adequate resources to do so effectively and that the additional service will not adversely impact the operational reliability of its core function of record keeping").

[151] *See, e.g., id.* (Trade repositories "should evaluate the potential sources of risks that can arise, and ensure that the risks that can arise in the design and operation of [domestic or cross-border links with other trade repositories, market infrastructures or service providers] are managed prudently on an ongoing basis.").

[152] *See* ARP II Release, 56 FR 22490, *supra* note 130.

those responsible for the development or operation of the systems being tested?

2. Electronic Filing

Proposed Rule 13n–6(c) would require that every notification, review, or description and analysis required to be submitted to the Commission under proposed Rule 13n–6 (other than those required under proposed Rule 13n–6(b)(3)(i), (ii), and (iii), which can be verbal) be submitted in an appropriate electronic format to the Office of Market Operations at the Division of Trading and Markets at the Commission's principal office in Washington, DC. This proposed requirement is intended to make proposed Rule 13n–6 consistent with electronic-reporting standards set forth in other Commission rules under the Exchange Act, such as Rule 17a–25 (Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers) [153] and Rule 19b–4 (Filings with respect to Proposed Rule Changes by Self-regulatory Organizations).[154]

The Commission preliminarily believes that the proposed provision would benefit SDRs by automating the process by which they submit notifications, reviews, and descriptions and analyses under proposed Rule 13n–6 to the Commission. The Commission currently receives this type of information from SROs and other entities in the securities market in electronic format. Moreover, as noted above, this provision is intended to be consistent with other Commission rules.

Proposed Rule 13n–6(c) would require submission of notifications, reviews, and descriptions and analyses in an "appropriate electronic format." The Commission anticipates that, if the provision is adopted, the staff would work with SDRs to determine appropriate electronic formats that could be used.

Request for Comment

The Commission requests comment on the following specific issues:

- Are there specific provisions in proposed Rule 13n–6(c) that should be eliminated or refined? If so, please explain your reasoning.
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for reporting information to the Commission?

3. Confidential Treatment

Proposed Rule 13n–6(d) would provide that a person who submits a notification, review, or description and analysis pursuant to this rule for which he or she seeks confidential treatment should clearly mark each page or segregable portion of each page with the words "Confidential Treatment Requested." Proposed Rule 13n–6(d) would state that "[a] notification, review, or description and analysis submitted pursuant to this [rule] will be accorded confidential treatment to the extent permitted by law."

The Commission would use the information collected under proposed Rule13n–6 to evaluate whether SDRs are reasonably equipped to handle market demand. For this reason, requiring SDRs to submit this information would be critical to the Commission's ability to effectively oversee SDRs.

Much of the information that the Commission expects to receive from SDRs is, by its nature, competitively sensitive. If the Commission were unable to afford confidential protection to the information that it expects to receive, then the SDRs may hesitate to submit the required information to the Commission. This result could potentially undermine the Commission's ability effectively to oversee SDRs, which, in turn, could undermine investor confidence in the SBS market.

The Freedom of Information Act ("FOIA") provides at least two exemptions under which the Commission has authority to grant confidential treatment for the information submitted under proposed Rule 13n–6. First, FOIA Exemption 4 provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." [155] As specified in proposed Rule 13n–6(d), "a notification, review, or description and analysis submitted pursuant to this [rule] will be accorded confidential treatment to the extent permitted by law." The information required to be submitted to the Commission under proposed Rule 13n–6 may contain proprietary information regarding automated systems that is privileged or confidential and thus subject to protection from disclosure under Exemption 4 of the FOIA.

Second, FOIA Exemption 8 provides an exemption for matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." [156] Similarly, Commission Rule 80(b)(8), Commission Records and Information, implementing Exemption 8, states that the Commission generally will not publish or make available to any person matters that are "[c]ontained in, or related to, any examination, operating, or condition report prepared by, on behalf of, or for the use of, the Commission, any other Federal, state, local, or foreign governmental authority or foreign securities authority, or any securities industry self-regulatory organization, responsible for the regulation or supervision of financial institutions." [157]

Request for Comment

The Commission requests comment on the following specific issues:

- Are there specific provisions in proposed Rule 13n–6(d) that should be eliminated or refined? If so, please explain your reasoning.
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs and the willingness of persons to register as SDRs?

G. Proposed Rule Regarding SDR Recordkeeping

The Commission is proposing Rule 13n–7 under the Exchange Act to specify the books and records requirements applicable to SDRs. Proposed Rule 13n–7's requirements are discussed below.

1. Records to be Made by SDRs

Proposed Rule 13n–7(a) would require SDRs to make and keep current certain books and records relating to its business. Proposed Rule 13n–7(a)(1) would require SDRs to make and keep current "a record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the security-based swap data repository maintains at that office and the information contained in those records." SDR recordkeeping practices may vary in ways ranging from format and presentation to the name of a record. Therefore, each SDR must be able to promptly explain how it makes, keeps, and titles its records. To comply with this proposed rule, an SDR may identify more than one person and list which records each person is able to explain. Because it may be burdensome for an SDR to keep this record current if it lists each person by name, a firm

[153] 17 CFR 240.17a–25.

[154] 17 CFR 240.19b–4.

[155] 5 U.S.C. 552(b)(4).

[156] 5 U.S.C. 552(b)(8).

[157] 17 CFR 200.80(b)(8).

may satisfy this proposed requirement by recording the persons capable of explaining the firm's records by either name or title.

Proposed Rule 13n–7(a)(2) would require SDRs to make and keep current "a record listing each officer, manager, or person performing similar functions of the security-based swap data repository responsible for establishing policies and procedures that are reasonably designed to ensure compliance with the [Exchange] Act and the rules and regulations thereunder." This proposed rule is intended to assist securities regulators by identifying individuals responsible for designing an SDR's compliance procedures and managing the SDR.

These two proposed requirements are based on Exchange Act Rules 17a–3(a)(21) and (22), respectively, which are applicable to broker-dealers.[158] The purpose of these rules is to assist the Commission in its inspection and examination function.[159] It is important for the Commission's examiners to have the ability to find quickly what records are maintained in a particular office and who is responsible for establishing particular policies and procedures of the SDR. These proposed requirements are designed to assist in obtaining this information. Based on the Commission's experience in conducting examinations of broker-dealers, we believe that requiring SDRs to comply with these two rules will facilitate the Commission's inspections and examinations of SDRs.

2. Records To Be Preserved by SDRs

Proposed Rule 13n–7(b)(1) would require SDRs to "keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the [Exchange] Act and the rules and regulations thereunder, correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such." This proposed rule is designed to include all electronic documents and correspondence such as emails and instant messages. Proposed Rule 13n–7(b)(2) would require SDRs to "keep all such documents for a period of not less than five years, the first two years in a place that is immediately available to the staff of the Commission for inspection." Proposed Rule 13n–7(b)(3) would require SDRs to, "upon request of any representative of the Commission, promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it pursuant to sections (a) and (b) of this Rule."

Proposed Rule 13n–7(b) is based on Exchange Act Rule 17a–1, which is the recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies, and the Municipal Securities Rulemaking Board ("MSRB").[160] Proposed Rule 13n–7(b) is intended to set forth the recordkeeping obligation of SDRs and thereby facilitate implementation of the broad inspection authority given to the Commission in Exchange Act Section 13(n)(2).[161] The Commission believes that Exchange Act Rule 17a–1 is better suited as a basis for SDR recordkeeping than the broker-dealer recordkeeping rules because the broker-dealer recordkeeping rules are specifically tailored for the business of broker-dealers.

3. Recordkeeping After an SDR Ceases To Do Business

Proposed Rule 13n–7(c) would require an SDR, if the SDR ceases doing business, or ceases to be registered pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, to continue to preserve, maintain, and make accessible the records/data required to be collected, maintained, and preserved by Rule 13n–7 in the manner required by this rule and for the remainder of the period required by this rule.[162] This proposed requirement is intended to allow the Commission to perform effective inspections and examinations of the SDRs pursuant to Exchange Act Section 13(n)(2).[163] The Commission preliminarily expects that an SDR would need to establish contingency plans so that another entity would be in the position to maintain this information after the SDR ceases to do business.

4. Applicability

Proposed Rule 13n–7(d) states that "this section does not apply to data collected and maintained pursuant to Rule 13n–5." This is to clarify that the requirements under proposed Rule 13n–7 are designed to capture those records of an SDR other than the transaction data, positions, and market data that would be required to be maintained in accordance with proposed Rule 13n–5, as discussed in Section III.E of this release.

Request for Comment

The Commission requests comment on the following specific issues:

- Should the Commission recommend a rule similar to Exchange Act Rule 17a–6 for SDRs?[164]
- Should the Commission recommend other requirements that might be necessary or useful in protecting the records of an SDR upon the failure of such entity?
- Should the Commission require records retained under this section to be retained electronically or furnished to the Commission electronically?
- What is the likely impact of these requirements on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining records at the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

H. Proposed Rule Regarding Reports To Be Provided to the Commission

The Commission is proposing Rule 13n–8 under the Exchange Act to specify certain reports that the SDR would have to provide to the Commission. Proposed Rule 13n–8 would require an SDR to "promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the [Exchange] Act and the rules and regulations thereunder." While the Commission has "direct electronic access" to the SBS transaction information maintained by the

[158] 17 CFR 240.17a–3(a)(21) and (22).

[159] Exchange Act Section 13(n)(2), Public Law 111–203, § 763(i), states that "[e]ach registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission." *See also* proposed Rule 13n–4(b)(1).

[160] 17 CFR 240.17a–1.

[161] *See also* proposed Rule 13n–4(b)(1).

[162] This proposed requirement is based on Exchange Act Rule 17a–4(g), 17 CFR 240.17a–4(g), which applies to broker-dealer books and records.

[163] *See also* proposed Rule 13n–4(b)(1).

[164] 17 CFR 240.17a–6. Exchange Act Rule 17a–6 applies to national securities exchanges, national securities associations, registered clearing agencies, and the MSRB. Exchange Act Rule 17a–6 allows for the destruction or disposal of records by these entities prior to the 5-year retention period of Exchange Act Rule 17a–1 if done according to a plan for destruction or disposal that is filed with and approved by the Commission.

there may be times when a report may be more useful to Commission staff in fulfilling their duties. For example, the Commission may request a report on the number of complaints the SDR has received pertaining to data integrity.

Request for Comment

The Commission requests comment on the following specific issues:

- What are the benefits and burdens of this requirement? Should any limitations be put on the types or frequency of reports requested by the Commission?
- Should the term "promptly" be defined or should the Commission use another term such as "as soon as technologically practicable after the time at which the request has been submitted"?
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining SBS data at the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

I. Proposed Rule Regarding Privacy of SBS Transaction Information

The Commission is proposing Rule 13n–9 to require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity. As mentioned above, this requirement is specifically enumerated in the Dodd-Frank Act.[166] The proposed rule would further provide that such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy of any and all SBS transaction information that the SDR shares with affiliates and nonaffiliated third parties.[167]

The proposed rule would also require each SDR to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of: (1) Any confidential information received by the SDR, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers;[168] (2) material, nonpublic information; and/or (3) intellectual property, such as trading strategies or portfolio positions, by the SDR or any person associated with the SDR for their personal benefit or the benefit of others.[169] Such safeguards, policies, and procedures shall address, without limitation, (1) limiting access to such confidential information, material, nonpublic information, and intellectual property, (2) standards pertaining to the trading by persons associated with the SDR for their personal benefit or the benefit of others, and (3) adequate oversight to ensure compliance of this provision.[170] This particular requirement incorporates current requirements regarding the treatment of proprietary information of clearing members, which are contained in exemptive orders issued to SBS clearing agencies,[171] and draws from Exchange Act Section 15(g), which requires broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer.[172]

The Commission anticipates that as a central recordkeeper of SBS transactions, each SDR will receive proprietary and highly sensitive information, which could disclose, for instance, a market participant's trade information, trading strategy, or nonpublic personal information. Proposed Rule 13n–9 is designed to ensure that an SDR has reasonable safeguards, policies, and procedures in place to protect such information from being misappropriated or misused by the SDR or any person associated with the SDR. The Commission preliminarily believes that an SDR's governance arrangements should have adequate internal controls to protect against such misappropriation or misuse. For instance, an SDR should limit access to the proprietary and sensitive information by creating informational, technological, and physical barriers. The Commission also preliminarily believes that an SDR should limit access to the data that it maintains to only those officers, directors, employees, and agents who need to know the data to perform their job responsibilities; such access should not necessarily be granted on an all-or-nothing basis. An SDR should also have controls to prevent unauthorized or unintentional access to its data.

Additionally, an SDR should consider restricting the trading activities of individuals who have access to proprietary or sensitive information maintained by the SDR or implementing

[166] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(5)).

[167] Proposed Rule 13n–9(b)(1).

[168] Under the proposed rule, the term "nonpublic personal information" would be defined as (1) personally identifiable information and (2) any list, description, or other grouping of market participants (and publicly available information pertaining to them) that is derived using personally identifiable information that is not publicly available information. Proposed Rule 13n–9(a)(5). The term "personally identifiable information" would be defined as any information (i) a market participant provides to an SDR to obtain service from the SDR, (ii) about a market participant resulting from any transaction involving a service between the SDR and the market participant, or (iii) the SDR obtains about a market participant in connection with providing a service to that market participant. Proposed Rule 13n–9(a)(6).

[169] Proposed Rule 13n–9(b)(2).

[170] *Id.*

[171] *See, e.g.,* ICE Trust Order stating "ICE Trust shall establish and maintain adequate safeguards and procedures to protect clearing members' confidential trading information. Such safeguards and procedures shall include: (A) limiting access to the confidential trading information of clearing members to those employees of ICE Trust who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (B) establishing and maintaining standards controlling employees of ICE Trust trading for their own accounts. ICE Trust must establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed." Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), Exchange Act Release No. 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009), and Exchange Act Release No. 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) (temporary exemptions in connection with CDS clearing by ICE Trust US LLC). *See also* Exchange Act Release No. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) and Exchange Act Release No. 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by ICE Clear Europe Limited); Exchange Act Release No. 60373 (July 23, 2009), 74 FR 37740 (July 29, 2009) and Exchange Act Release No. 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by Eurex Clearing AG); Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), Exchange Act Release No. 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009) and Exchange Act Release No. 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) (temporary exemptions in connection with CDS clearing by Chicago Mercantile Exchange Inc.).

[172] *See* 15 U.S.C. 78o(g). *See also* Public Law 111–203 (adding Exchange Act Section 15F(j)(5) (requiring SBS dealers and major SBS participants to "establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any security-based swap or acting in a role of providing clearing activities or making determinations as to accepting clearing customers are separated by appropriate informational partitions with the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision and contravene the [enumerated] core principles of open access and the business conduct standards * * * ").

firm-wide restrictions on trading certain SBSs, as well as underlying or related investment instruments. Such restrictions could include, for example, a pre-trade clearance requirement. An SDR should also have systems in place to prevent and detect insider trading by the SDR or persons associated with the SDR. Such systems could include a mechanism to monitor such persons' access to the SDR's data, their trading activities, and their e-mails.

The Commission preliminarily believes that to the extent that an SDR or any person associated with the SDR shares information with a nonaffiliated third party, an SDR's policies and procedures should ensure the privacy of the information shared. For instance, an SDR should consider requiring the nonaffiliated party to consent to being subject to the SDR's privacy policies and procedures as a condition of receiving any sensitive information from the SDR.

Request for Comment

The Commission requests comment on the following specific issues:

- Are the Commission's proposed definitions of "nonpublic personal information" and "personally identifiable information" appropriate and sufficiently clear? If not, what specific modifications are appropriate or necessary?
- Are the Commission's privacy requirements appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Should the proposed SDR's protection of privacy extend to any other person (*e.g.,* third party service providers, market infrastructures, or venues from which data can be submitted to the SDR)?
- What other examples of confidential information, material, nonpublic information, and intellectual property should be protected by an SDR?
- Should the Commission require anything else to be protected in an SDR's privacy policies and procedures?
- Should the Commission prescribe any other preventive measures that an SDR must include in its privacy policies and procedures?
- With respect to entities that currently perform repository services for SBSs or other entities, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

J. Proposed Rule Regarding Disclosure to Market Participants

Pursuant to the Commission's authority under Exchange Act Sections 13(n)(3), 13(n)(7)(D)(i), and 13(n)(9),[173] the Commission is proposing Rule 13n–10 to enhance transparency in the SBS market, bolster market efficiency, promote standardization, and foster competition. Specifically, the proposed rule would provide that before accepting any SBS data from a market participant or upon a market participant's request, each SDR shall furnish to the market participant a disclosure document that contains the following written information, which must reasonably enable the market participant to identify and evaluate accurately the risks and costs associated with using the SDR's services: (1) The SDR's criteria for providing others with access to services offered and data maintained by the SDR, (2) the SDR's criteria for those seeking to connect to or link with the SDR, (3) a description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data, (4) a description of the SDR's policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity, (5) a description of the SDR's policies and procedures regarding its non-commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person, (6) a description of the SDR's dispute resolution procedures involving market participants, (7) a description of all the SDR's services, including any ancillary services, (8) the SDR's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates, and (9) a description of the SDR's governance arrangements.[174]

These proposed disclosure requirements are intended to promote competition and foster service transparency by enabling market participants to identify the range of services that each SDR offers and to evaluate the risks and costs associated with using such services. The Commission also preliminarily believes that service transparency is particularly important in light of the complexity of OTC derivatives products and their markets, and that greater service transparency could improve market participants' confidence in an SDR and result in greater use of the SDR, which would ultimately increase market efficiency.

Request for Comment

The Commission requests comment on the following specific issues:

- Are the proposed disclosure requirements to market participants appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Should the Commission require SDRs to make the proposed disclosure to market participants in any other instances?
- Should the Commission not require disclosure of any of the information specified in this proposed rule? If so, what and why?
- Should the Commission require disclosure of the specified information only upon request and not necessarily before an SDR accepts SBS data from a market participant?
- Should the Commission require disclosure of any other information? If so, what and why?
- Should the Commission require SDRs to provide market participants with updated disclosure documents? If so, how often (*e.g.,* annually, when there are material changes to an SDR's disclosed policies and procedures)?
- Should the Commission require disclosure of the proposed information to anyone else besides market participants? If so, to whom and why? Should the disclosure be the same or vary depending on the recipient?
- Should the Commission permit disclosure of the proposed information on an SDR's Web site? If so, would such disclosure be as meaningful? How should the Commission address the problem of the disclosure possibly being embedded in an SDR's Web site so as to make it difficult for market participates to navigate their way to find the disclosure? Would a disclosure on an SDR's Web site be equally effective, less effective, or more effective than a disclosure document furnished to market participants? Should the Commission prescribe any restrictions regarding disclosure on an SDR's Web site?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising

[173] *See* Public Law 111–203, § 763(i).

[174] *See* proposed Rule 13n–10(b).

their current practices in order to implement the Commission's proposed rule?

K. Proposed Rule Regarding Chief Compliance Officer of Each SDR

The Commission is proposing Rule 13n–11, which would incorporate the duties of an SDR's CCO that are enumerated in Exchange Act Section 13(n)(6) [175] and impose additional requirements.

1. Enumerated Duties of Chief Compliance Officer

Specifically, proposed Rule 13n–11(a) would require each SDR to identify on Form SDR a person who has been designated by the board to serve as a CCO of the SDR. The proposed rule would also provide that the compensation and removal of the CCO shall require the approval of a majority of the SDR's board.[176] This proposed requirement is intended to promote the independence and effectiveness of the CCO.

Under proposed Rule 13n–11(c), each CCO shall: (1) Report directly to the board or to the chief executive officer of the SDR, (2) review the compliance of the SDR with respect to the requirements and core principles described in Exchange Act Section 13(n) and the rules and regulations thereunder, (3) in consultation with the board or the SDR's chief executive officer, resolve any conflicts of interest that may arise, (4) be responsible for administering each policy and procedure that is required to be established pursuant to Exchange Act Section 13 and the rules and regulations thereunder, (5) ensure compliance with the Exchange Act and the rules and regulations thereunder relating to SBSs, including each rule prescribed by the Commission under Exchange Act Section 13, (6) establish procedures for the remediation of noncompliance issues identified by the CCO through any (a) compliance office review, (b) look-back, (c) internal or external audit finding, (d) self-reported error, or (e) validated complaint, and (7) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

The Commission notes that an SDR would not be required to hire an additional person to serve as its CCO. Instead, an SDR can designate an individual already employed with the SDR as its CCO. The CCO would be responsible for, among other things, keeping the board or the SDR's chief executive officer apprised of significant compliance issues and advising the board or chief executive officer of needed changes in the SDR's policies and procedures. Given the critical role that a CCO is intended to play in ensuring an SDR's compliance with the Exchange Act and the rules and regulations thereunder, the Commission believes that an SDR's CCO should be competent and knowledgeable regarding the federal securities laws and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the SDR. To meet his statutory obligations, a CCO should also have a position of sufficient seniority and authority within the SDR to compel others to adhere to the SDR's policies and procedures.

The Commission is concerned that an SDR's commercial interests might discourage its CCO from making forthright disclosure to the board or chief executive officer about any compliance failures. To mitigate this potential conflict of interest, the Commission preliminarily believes that an SDR's CCO should be independent from its management so as not to be conflicted in reporting or addressing any compliance failures. As mentioned, each CCO of an SDR is statutorily required to report directly to the board or its chief executive officer, but only the board would be able to discharge the CCO from his or her responsibilities and would be able to approve the CCO's compensation.

Request for Comment

The Commission requests comment on the following specific issues:

- Are there any terms in the proposed rule incorporating the duties of a CCO that need to be clarified or modified (*e.g.,* "look-back," "self-reported error," "validated complaint")? If so, which terms and how should they be defined?
- Should the Commission require a CCO of an SDR to report to any other senior officer besides its chief executive officer? If so, to whom and why?
- Is the Commission's proposed requirement regarding an SDR's board approval of a CCO's compensation and a CCO's removal appropriate? If not, why and what would be a better alternative to promote the independence and effectiveness of the CCO? Should the required percentage of board approval be lower or higher?
- Should the Commission prohibit a CCO of an SDR from being a member of the SDR's legal department or the SDR's general counsel?
- Should the Commission prohibit any officers, directors, or employees of an SDR from, directly or indirectly, taking any action to coerce, manipulate, mislead, or fraudulently influence the SDR's CCO in the performance of his responsibilities?
- Should the Commission prohibit an SDR's board from requiring its CCO to make any changes to his annual compliance report? Would such a prohibition be necessary in light of the CCO's statutory requirement to certify that the compliance report is accurate and complete?
- Are there other measures that would further enhance the independence and effectiveness of a CCO and that should be prescribed in a rule?
- Should the Commission impose any additional duties on a CCO of an SDR that are not already enumerated in the legislation and incorporated in the proposed rule?
- Should the Commission provide guidance in its proposed rules about the CCO's procedures for the remediation of noncompliance issues?
- Should the Commission provide guidance in its proposed rules on what would be considered "appropriate procedures" for the handling, management response, remediation, retesting, and closing of noncompliance issues? If so, what factors should the Commission take into consideration?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- How might the evolution of the SBS market over time affect SDRs or impact the Commission's proposed rule?

2. Annual Reports

A CCO of an SDR is required, under Exchange Act Section 13(n)(6)(C)(i), to annually prepare and sign a report that contains a description of the compliance of the SDR with respect to the Exchange Act and the rules and regulations thereunder and each policy and procedure of the SDR (including the code of ethics and conflicts of interest

[175] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(6)).

[176] Proposed Rule 13n–11(a).

policies of the SDR).[177] The Commission is proposing Rule 13n–11(d) to require each annual compliance report to contain, at a minimum, a description of: (1) The SDR's enforcement of its policies and procedures, (2) any material changes[178] to the policies and procedures since the date of the preceding compliance report, (3) any recommendation for material changes to the policies and procedures as a result of the annual review, the rationale for such recommendation, and whether such policies and procedures were or will be modified by the SDR to incorporate such recommendation, and (4) any material compliance matters[179] identified since the date of the preceding compliance report. The Commission notes that individual compliance matters may not be material when viewed in isolation, but may collectively suggest a material compliance matter.

Although the proposed rule would require only annual reviews, CCOs should consider the need for interim reviews in response to significant compliance events, changes in business arrangements, and regulatory developments. For example, if there is an organizational restructuring of an SDR, then its CCO should evaluate whether its policies and procedures are adequate to guard against potential conflicts of interest. Additionally, if a new rule regarding SDRs is adopted by the Commission, then a CCO should review its policies and procedures to ensure compliance with the rule. Furthermore, a CCO should review, on an ongoing basis, the SDR's service levels, costs, pricing, and operational reliability, with the view to preventing anticompetitive practices and discrimination, and encouraging innovation and the use of the SDR.

Under the proposed rule, an SDR would be required to file with the Commission a financial report, as discussed further in Section III.K.3 below, along with a compliance report, which must include a certification that, under penalty of law, the compliance report is accurate and complete.[180] The compliance report would also be required to be filed in a tagged data format in accordance with instructions contained in the EDGAR Filer Manual, as described in Rule 301 of Regulation S–T.[181]

In addition, a CCO would be required to submit the annual compliance report to the board for its review prior to the submission of the report to the Commission under proposed Rule 13n–11(d)(2).[182] The Commission notes that a CCO should promptly bring serious compliance issues to the board's attention rather than wait until an annual report is prepared.

Request for Comment

The Commission requests comment on the following specific issues:

- Are the Commission's proposed rules regarding annual compliance reports appropriate and sufficiently clear? If not, why not and what would be a better approach?
- Are the proposed definitions of "material change" and "material compliance matter" appropriate? If not, are they over-inclusive or under-inclusive and how should they be defined?
- Is the Commission's proposed timeframe for a CCO to submit his annual report to the board appropriate? If not, should the timeframe be shorter or longer? Should the Commission permit the SDR to request an extension to file an annual report (*e.g.,* due to substantial, undue hardship)?
- If a CCO reports to the chief executive officer of the SDR rather than its board, should the Commission permit the CCO to submit his annual report to the chief executive officer rather than the board, in addition to the board, or only when an SDR does not have a board? Would any of these alternatives lessen the independence of the CCO in any way?
- If the Commission were to require an SDR to have independent directors, should the Commission require a CCO to meet separately with the independent directors at least annually? If not, why not and what would be a better alternative?
- Are the Commission's proposed minimum disclosure requirements in the CCO's annual report appropriate? If not, why not and what would be a better alternative?
- Should the Commission require any other disclosure in the CCO's annual report?
- Should the CCO's compliance reports be deemed confidential, by rule, or should an SDR simply rely on the FOIA exemptions discussed in Section III.F.3 of this release?
- Would keeping the compliance reports confidential encourage the CCO to be more forthcoming about sensitive compliance issues or would it likely not have any impact on the disclosure of such issues?
- Are there any disadvantages to keeping the CCO's compliance report confidential? How could the Commission address any such disadvantage?
- Would making the CCO's compliance report public be useful to the public or other regulators?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- How might the evolution of the SBS market impact the SDRs or the Commission's proposed rule?

3. Financial Reports

The Commission is proposing Rule 13n–11(f) to require each financial report to be a complete set of financial statements of the SDR that are prepared in conformity with U.S. generally accepted accounting principles ("GAAP") for the most recent two fiscal years of the SDR.[183] Additionally, the proposed rule would provide that each financial report shall be audited in accordance with the standards of the Public Company Accounting Oversight Board ("PCAOB") by a registered public accounting firm[184] that is qualified and independent in accordance with Rule 2–01 of Regulation S–X.[185]Each financial report would be required to include a

[177] *See* Public Law 111–203, § 763(i).

[178] The term "material change" would be defined as a change that a CCO would reasonably need to know in order to oversee compliance of the SDR. *See* proposed Rule 13n–11(b)(5).

[179] The term "material compliance matter" would be defined as any compliance matter that the board would reasonably need to know to oversee the compliance of the SDR and that involves, without limitation: (1) A violation of the federal securities laws by the SDR, its officers, directors, employees, or agents; (2) a violation of the policies and procedures of the SDR, its officers, directors, employees, or agents; or (3) a weakness in the design or implementation of the SDR's policies and procedures. *See* proposed Rule 13n–11(b)(6).

[180] *See* proposed Rule 13n 11(d)(2).

[181] *See id.; see also* 17 CFR 232.301. The information in each compliance report would be tagged using an appropriate machine-readable, data tagging format to enable the efficient analysis and review of the information contained in the report.

[182] Proposed Rule 13n 11(e).

[183] Proposed Rule 13n–11(f)(1).

[184] The term "registered public accounting firm" is defined in Exchange Act Section 3(a)(59) to have the same meaning as in Section 2 of the Sarbanes-Oxley Act of 2002. *See* 15 U.S.C. 78c(a)(59). Section 2 of the Sarbanes-Oxley Act defines "registered public accounting firm" as a public accounting firm registered with the PCAOB in accordance with the Sarbanes-Oxley Act.

[185] Proposed Rule 13n–11(f)(2).

report of the registered accounting firm that complies with paragraphs (a) through (d) of Rule 2–01 of Regulation S–X.[186] This proposed rule is drawn from Exchange Act Rule 17a–5.[187]

If an SDR's financial statements contain consolidated information of a subsidiary of the SDR, then the SDR's financial statements must provide condensed financial information, in a financial statement footnote, as to the financial position, changes in financial position and results of operations of the SDR, as of the same dates and for the same periods for which audited consolidated financial statements are required.[188] Such financial information need not be presented in greater detail than is required for condensed statements by Rules 10–01(a)(2), (3), and (4) of Regulation S–X.[189] Detailed footnote disclosure that would normally be included with complete financial statements may be omitted with the exception of disclosures regarding material contingencies, long-term obligations, and guarantees.[190] Descriptions of significant provisions of the SDR's long-term obligations, mandatory dividend or redemption requirements of redeemable stocks, and guarantees of the SDR shall be provided along with a five-year schedule of maturities of debt.[191] If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the SDR have been separately disclosed in the consolidated statements, then they need not be repeated in this schedule.[192] This proposed requirement is substantially similar to Rule 12–04 of Regulation S–X, which pertains to condensed financial information of registrants.[193]

Proposed Rule 13n–11(f) would also require an SDR's financial reports to be provided in XBRL consistent with Rules 405(a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S–T.[194] Specifically, information in an SDR's financial report would be required to be tagged using XBRL to allow the Commission to assess and analyze effectively the SDR's financial and operational condition.

Finally, annual compliance reports and financial reports filed pursuant to proposed Rule 13n–11 would be required to be filed within 60 days after the end of the fiscal year covered by such reports.[195]

The Commission notes that with respect to its other registrants, the Commission has required, at a minimum, the proposed financial information and, in some instances, significantly more information.[196] The Commission believes that it is necessary to obtain an audited annual financial report from each registered SDR to understand the SDR's financial and operational condition, particularly because SDRs are intended to play a pivotal role in improving the transparency and efficiency of the SBS market and because SBSs (whether cleared or uncleared) are required to be reported to a registered SDR.[197] Among other things, the Commission would need to know whether an SDR has adequate financial resources to comply with its statutory obligations or is having financial difficulties. If an SDR ultimately ceases doing business, it could create a significant disruption in the OTC derivatives market.

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed rule regarding an SDR's financial report appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Should the Commission permit a financial report to be in compliance with International Financial Reporting Standards as an alternative to GAAP? If so, are there any disadvantages to permitting this?
- Is the Commission's proposed rule requiring financial reports to cover the most recent two fiscal years of an SDR appropriate? If not, should the timeframe be shorter or longer (*e.g.,* the most recent three fiscal years)?
- Is the Commission's proposed requirement regarding an SDR's condensed financial information appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Is the Commission's proposed 60-day timeframe for an SDR to file the financial report appropriate? If not, should the timeframe be shorter or longer (*e.g.,* 90 days)?
- Would an SDR's financial report be useful to the public or other regulators? If so, explain.
- Are there any terms in the Commission's proposed rule regarding an SDR's financial report that need to be defined or clarified? If so, which terms?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?
- How might the evolution of the SBS market over time impact the SDRs or affect the Commission's proposed rule?

IV. General Request for Comment

The Commission is requesting comment from all members of the public. The Commission particularly requests comments from the point of view of entities that plan to register as SDRs; entities operating platforms that currently trade or clear SBSs; SBS dealers, broker-dealers, financial institutions, major SBS participants, and other persons that trade SBSs; and investors generally. The Commission will carefully consider the comments that it receives. The Commission seeks comment generally on all aspects of the proposed rules. In addition, the Commission seeks comment on the following:

1. Should the Commission clarify or modify any of the definitions included in the proposed rules? If so, which definitions and what specific modifications are appropriate or necessary?
2. Are the obligations in the proposed rules sufficiently clear? Is additional guidance from the Commission necessary?
3. What documents and data are typically and currently kept by entities that may register as SDRs? In what format? How long are such records currently maintained by SDRs?
4. What types of documents and data should be retained by SDRs pursuant to the proposed rules? What burdens or costs would the retention of such information entail?
5. What are the technological or administrative burdens of maintaining the information specified in the proposed rules?
6. Is there an industry standard format for information and records regarding SBSs? Are there different standard formats depending on the type or class of SBS? Please answer with specificity.
7. Are the burdens of any of the requirements in the proposed rules greater than the benefits that would be attained by such requirement?
8. Should the Commission implement substantive requirements in addition to, or in place of, the policies and procedures required in the proposed rules?

[186] Proposed Rules 13n–11(f)(3).

[187] 17 CFR 240.17a–5.

[188] Proposed Rule 13n–11(f)(4).

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *See* 17 CFR 210.9–06.

[194] *See* 17 CFR 232.405 (imposing content, format, submission, and Web site posting requirements for an interactive data file, as defined in Rule 11 of Regulation S–T).

[195] Proposed Rule 13n–11(g).

[196] *See, e.g.,* Exchange Act Rule 17a–5(d), 17 CFR 240.17a–5(d).

[197] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(m)(1)(G)).

9. The role of SDRs is still developing and may change significantly as the SBS market develops. In particular, the new provisions in the Dodd-Frank Act relating to SDRs are not yet effective. Once they become effective, SDRs will be subject to substantially more regulation. How will the incentives and behavior of market participants be likely to change as the reporting of SBSs to SDRs becomes more established? How will potential changes in the trading of SBSs affect SDRs? How might competition issues affect or change existing SDRs and new SDRs?

10. With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in these rules? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rules?

In addition, the Commission seeks commenters' views regarding any potential impact of the proposals on users of any SDRs, other market participants, and the public generally. The Commission seeks comment on the proposal as a whole, including its interaction with the other provisions of the Dodd-Frank Act. The Commission seeks comment on whether the proposal would help achieve the broader goals of increasing transparency and accountability in the SBS market.

The Commission requests comment generally on whether the rules proposed today to govern the SDR registration process, duties, and core principles are necessary or appropriate for those purposes. If commenters do not believe one or all such rules are necessary and appropriate, why not? What would be the preferred action?

Title VII requires the SEC to consult and coordinate, to the extent possible, with the CFTC for the purposes of assuring regulatory consistency and comparability, to the extent possible, and states that in adopting rules, the CFTC and SEC shall treat functionally or economically similar products or entities in a similar manner.

The CFTC is adopting rules related to swap data repositories as required under Section 728 of the Dodd-Frank Act. Understanding that the Commission and the CFTC regulate different products and markets, and as such, may appropriately be proposing alternative regulatory requirements, we request comment on the impact of any differences between the Commission and CFTC's approaches to the regulation of SDRs and swap data repositories, respectively. Specifically, do the regulatory approaches under the Commission's proposed rulemaking pursuant to Section 763(i) of the Dodd-Frank Act and the CFTC's proposed rulemaking pursuant to Section 728 of the Dodd-Frank Act result in duplicative or inconsistent efforts on the part of market participants subject to both regulatory regimes or result in gaps between those regimes? If so, in what ways do commenters believe that such duplication, inconsistencies, or gaps should be minimized? Do commenters believe that the approaches proposed by the Commission and the CFTC to regulate SDRs and swap data repositories, respectively, are comparable? If not, why? Do commenters believe there are approaches that would make the regulation of swap data repositories and SDRs more comparable? If so, what? Do commenters believe that it would be appropriate for us to adopt an approach proposed by the CFTC that differs from our proposal? If so, which one?

Commenters should, when possible, provide the Commission with empirical data to support their views. Commenters suggesting alternative approaches should provide comprehensive proposals, including any conditions or limitations that they believe should apply, the reasons for their suggested approaches, and their analysis regarding why their suggested approaches would satisfy the statutory mandate contained in Section 763(i) of the Dodd-Frank Act governing SDRs.

V. Paperwork Reduction Act

Certain provisions of the proposed rules would impose new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[198] The Commission has submitted them to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The title of the new collection of information is "Form SDR and Security-Based Swap Data Repository Registration, Duties, and Core Principles." An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has not yet assigned a control number to the new collection of information.

[198] 44 U.S.C. 3501 *et seq.*

A. Summary of Collection of Information

1. Registration Requirements and Form SDR

Proposed Rule 13n–1(b) would require an SDR to apply for registration with the Commission by filing electronically in tagged data format on Form SDR in accordance with the instructions contained therein. Under Proposed Rule 13n–1(f), SDRs would be required to both designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, to accept notice or service of process, pleadings, or other documents in any action or proceedings brought against the SDR to enforce the federal securities laws and the rules and regulations thereunder. Under proposed Rule 13n–1(g) a non-resident SDR must certify on Form SDR and provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the books and records of such SDR and can, as a matter of law, submit to onsite inspection and examination by the Commission. Under proposed Rule 13n–3(a), in the event that an SDR succeeds to and continues the business of a registered SDR, the successor SDR would be required to file an application for registration on Form SDR within 30 days after such succession in order for the registration of the predecessor to be deemed to remain effective as the registration of the successor. Also, under proposed Rule 13n–11(a), SDRs would be required to identify on Form SDR a person who has been designated by the board to serve as CCO of the SDR.

Proposed Rule 13n–1(e) would require SDRs to file an amendment on Form SDR annually as well as when updating any information provided in items 1 through 16, 25, and 44 on Form SDR if any information contained in those items is or becomes inaccurate for any reason. Under proposed Rule 13n–3(b), if an SDR succeeds to and continues the business of a registered SDR and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor SDR would be permitted, within 30 days after such succession, to amend the registration of the predecessor SDR to reflect these changes.

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

Proposed Rule 13n–4(b) sets out a number of duties for SDRs. Under proposed Rule 13n–4(b)(2) and (4),

SDRs would be required to accept data as prescribed in proposed Regulation SBSR,[199] and maintain such data as required in proposed Rule 13n–5 for each SBS reported to the SDRs. SDRs would be required, pursuant to proposed Rule 13n–4(b)(5), to provide direct electronic access to the Commission or its designees.[200] The Commission has reserved the ability to specify the form and manner in which an SDR provides this direct electronic access. SDRs would be required, pursuant to Rule 13n–4(b)(6), to provide this data in such form and at such frequency as required by proposed Regulation SBSR.

SDRs would have an obligation under proposed Rule 13n–4(b)(3) to confirm with both counterparties the accuracy of the information submitted to the SDR. Under proposed Rule 13n–4(b)(7), at such time and in such manner as may be directed by the Commission, an SDR would be required to establish automated systems for monitoring, screening, and analyzing SBS data.[201] Under proposed Rule 13n–4(b)(9), SDRs would be required to, on a confidential basis and after notification to the Commission, make available all data obtained by the SDR upon the request of certain government bodies such as the CFTC and the Department of Justice.[202] Under proposed Rule 13n–4(b)(10), before sharing information with any entity described in proposed Rule 13n–4(b)(9), the SDR must obtain a written agreement from each entity stating that the entity shall abide by the confidentiality requirements of Exchange Act Section 24 as well as indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided.

Proposed Rule 13n–5 would establish rules regarding SDR data collection and maintenance. Proposed Rule 13n–5(b)(1) would require that SDRs establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of transaction data to the SDR,[203] to accept all transaction data reported to it in accordance with these policies and procedures, to accept all data provided to it regarding all SBSs in an asset class if the SDR accepts data on any SBS in that particular asset class, and to satisfy itself by reasonable means that the transaction data that has been submitted to the SDR is accurate, including clearly identifying the source for each trade side, and the pairing method (if any) for each transaction in order to identify the level of quality of the transaction data. An SDR would also be required under proposed Rule 13n–5(b)(1)(iv) to promptly record transaction data it receives.

Proposed Rule 13n–5(b) would also require that SDRs establish, maintain, and enforce written policies and procedures reasonably designed (1) to calculate positions for all persons with open SBSs for which the SDR maintains records; (2) to ensure that the transaction data and positions that it maintains are accurate; and (3) to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR.

Proposed Rule 13n–5(b)(4) would require that SDRs maintain the transaction data for not less than five years after the applicable SBS expires and historical positions for not less than five years. This data would be required to be maintained in a place and format that is readily accessible to the Commission and other persons with authority to access or view the information and would also be required to be maintained in an electronic format that is non-rewritable and non-erasable. Under proposed Rule 13n–5(b)(7), the SDR's recordkeeping obligation would extend to the periods required under these rules even if the SDR ceases to do business or to be registered pursuant to Section 13(n) of the Act. Proposed Rule 15n–5(b)(8) would require SDRs to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with Rule 13n–5(b)(7), including procedures for transferring the transaction data and positions to the Commission or its designee (including another registered SDR).

Proposed Rule 13n–6 would establish rules regarding SDR automated systems. As detailed above, proposed Rule 13n–6(b)(1) would require that SDRs establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's systems provide adequate levels of capacity, resiliency, and security and such policies and procedures shall include, among other elements, reasonable capacity limits, periodic capacity stress testing, and review of vulnerabilities of the SDR's systems.

Proposed Rule 13n–6(b)(3) would require that the SDR promptly notify the Commission of any material systems outages and submit to the Commission within five business days of when the outage occurred a written description and analysis of the outage and any remedial measures implemented or contemplated. The definition of "material system outage" in proposed Rule 13n–6(a)(1) refers to a number of documents that would trigger such an event, such as a communication of an outage situation to other external entities and a report or referral of an event to the SDR's board or senior management. Proposed Rule 13n–6(b)(4) would require that the SDR notify the Commission in writing at least thirty days before implementation of a planned material systems change. Pursuant to proposed Rule 13n–6(c), these notifications and description and analysis would be required to be submitted to the Division of Trading and Markets in an appropriate electronic format. Pursuant to proposed Rule 13n–6(d), these notifications and description and analysis can be afforded confidential treatment, to the extent permitted by law, if the requestor marks each page or segregable portion of each page with a notation.

3. Recordkeeping

Proposed Rule 13n–7(d) would require that the SDR keep records, in addition to those required under proposed Rule 13n–5. SDRs would be required, under proposed Rule 13n–7(a)(1), to make and keep current a record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the SDR maintains at that office and the information contained in those records. SDRs would also be required, under proposed Rule 13n–7(a)(2), to make and keep current a record listing each officer, manager, or person performing similar functions of the SDR responsible for establishing policies and procedures that are reasonably designed to ensure compliance with the Exchange Act and the rules and regulations thereunder. Proposed Rule 13n–7(b) would require every SDR to keep and preserve at least one copy of all documents as shall be made or received by it in the course of its business as such. These records would be required to be kept for a period of not less than five years, the first two years in a place immediately available to Commission staff for inspection and examination. Upon the request of any representative of the Commission, an SDR would be

[199] *See* Regulation SBSR Release, *supra* note 9.

[200] *See also* proposed Rule 13n–4(a)(6) (defining "direct electronic access").

[201] The Commission is not making any such direction in this release. *See supra* Section III.D.I. Should the Commission do so, the collection of information would be amended to reflect the change.

[202] SDRs would also be required under proposed Rule 13n–4(b)(9) to make all data available to "any other person that the Commission determines to be appropriate," including such entities as foreign financial supervisors, provided that the SDR obtains a written agreement as set forth in proposed Rule 13n–4(b)(10).

[203] Transaction data is defined in proposed Rule 13n–5(a)(1).

required to furnish promptly to such representative copies of any documents required to be kept and preserved by the SDR pursuant to proposed Rule 13n–7(a) or (b). Under proposed Rule 13n–7(c), the SDR's recordkeeping obligation would extend to the periods required under these rules even if the SDR ceases to do business or to be registered pursuant to Section 13(n) of the Act.

SDRs would also be required to make available the books and records required by proposed Rules 13n–1 through 13n–11 upon request by representatives from the Commission for examination and inspection.[204]

4. Reports and Reviews

The proposed rules would require that a number of reports or reviews be submitted to the Commission. Under proposed Rule 13n–6(b)(2), SDRs would be required to submit to the Commission an annual objective review with respect to those systems that support or are integrally related to the performance of the SDR's activities. If the objective review is performed by an internal department, an objective external firm would be required to assess the internal department's objectivity, competency, and work performance.

Under proposed Rule 13n–8, SDRs would be required to promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines necessary or appropriate for the Commission to perform the duties of the Commission.

5. Disclosure

Proposed Rule 13n–10 describes disclosures that SDRs would be required to provide to a market participant before accepting any SBS data from that market participant or upon a market participant's request. The information required in the disclosure document would be (1) the SDR's criteria for providing others with access to services offered and data maintained by the SDR; (2) the SDR's criteria for those seeking to connect to or link with the SDR; (3) a description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data (as described in proposed Rule 13n–6); (4) the SDR's policies and procedures required by proposed Rule 13n–9(b)(1); (5) the SDR's policies and procedures regarding its non-commercial and commercial use of the transaction information that it receives; (6) the SDR's dispute resolution procedures required by proposed Rule 13n–5(b)(6); (7) a description of all of the SDR's services, including any ancillary services; (8) an updated schedule of the SDR's dues, unbundled prices, rates or other fees of all its services, as well as any discounts or rebates offered and the criteria to benefit from those discounts or rebates; and (9) a description of the SDR's governance arrangements.

6. Chief Compliance Officer

Proposed Rules 13n–4(b)(11) and 13n–11(a) would require the board of an SDR to designate a CCO to perform the duties identified in proposed Rule 13n–11. Under proposed Rule 13n–11(c)(6) and (7), the CCO would be responsible for, among other things, establishing procedures for the remediation of noncompliance issues identified by the CCO and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

The CCO would also be required under proposed Rule 13n–11(d) and (g) to prepare and submit annual compliance reports to the Commission and the SDR's board containing, at a minimum, the SDR's enforcement of its policies, any material changes to the policies and procedures since the date of the preceding compliance report, any recommendation for material changes to the policies and procedures, and any material compliance matters identified since the date of the preceding compliance report. This report must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual.[205]

Proposed Rule 13n–11(f) and (g) would require that annual financial reports be prepared and submitted to the Commission. These financial reports must, among other things, be prepared in conformity with GAAP for the most recent two fiscal years of the SDR, audited by a registered public accounting firm that is qualified and independent in accordance with Rule 2–01 of Regulation S–X, and are in accordance with standards of the Public Company Accounting Oversight Board. This report must be provided in XBRL as required in Rules 405(a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S–T.[206]

7. Other Provisions Relevant to the Collection of Information

Proposed Rule 13n–4(c)(1) sets forth the proposed requirements related to market access to services and data. Among these are requirements that the SDR (1) establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR, as well as fair, open, and not unreasonably discriminatory participation by those seeking to connect or link with the SDR and (2) establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to services offered or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly.

Proposed Rule 13n–4(c)(2)(iv) would require that SDRs establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, to have a clear understanding of their responsibilities, and to exercise sound judgment about the SDR's affairs.

Proposed Rule 13n–4(c)(3) sets forth the proposed conflicts of interest controls that would be required of SDRs. SDRs would be required to establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest, including establishing, maintaining, and enforcing written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an on-going basis and regarding the SDR's non-commercial and commercial use of the SBS transaction information that it receives.

Proposed Rule 13n–5(b)(6) would require that SDRs establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

Proposed Rule 13n–9 relates to the privacy requirements that would be required of SDRs. Proposed Rule 13n–9(b)(1) would require SDRs to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS

[204] *See, e.g.,* proposed Rules 13n–4(b)(1) and 13n–7(b)(3).

[205] *See* 17 CFR 232.301.

[206] *See* 17 CFR 232.405.

transaction information that the SDR receives from any SBS dealer, counterparty, or any registered entity. Proposed Rule 13n–9(b)(2) would require SDRs to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse of any confidential information received by the SDR, material, nonpublic information, or intellectual property. At a minimum, such policies and procedures must limit access to such information, include standards that control persons associated with the SDR in trading for their personal benefit or the benefit of others, and adequate oversight.

B. Proposed Use of Information

1. Registration Requirements and Form SDR

As discussed above, proposed Rules 13n–1 and 13n–3 would require SDRs to register on Form SDR and make amendments to Form SDR. Certain additional information would be required on Form SDR, including agent for service of process and identification of the SDR's CCO pursuant to proposed Rule 13n–11(a). The information collected in these provisions would be used to enhance the ability of the Commission to monitor SDRs and ensure compliance with the Exchange Act and the rules and regulations thereunder by helping the Commission identify SDRs, as well as understand their operations and organizational structure.

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

As discussed above, proposed Rules 13n–4(b), 13n–5, and 13n–6 would require that SDRs comply with specified duties, collect specific data that is provided to certain entities in specific ways as well as maintain that data in specific ways, and establish certain oversight programs over its automated systems. The information that would be collected under these provisions would help ensure an orderly and transparent SBS market as well as provide the Commission and other parties with tools to help oversee this market.

3. Recordkeeping

As discussed above, proposed Rule 13n–7 would require an SDR to make and keep records associated with all the proposed rules except for the data collected and maintained pursuant to proposed Rule 13n–5 for a prescribed period. The information that would be collected under these provisions would be necessary for the Commission to conduct its inspection and examination programs regarding SDRs.

4. Reports and Reviews

As discussed above, proposed Rules 13n–6(b)(2) and 13n–8 would require certain reports or reviews be provided to the Commission. The information that would be collected under these provisions would be used by the Commission to assist in its oversight of SDRs, including ensuring an orderly and transparent SBS market.

5. Disclosure

As discussed above, proposed Rule 13n–10 would require that SDRs provide certain specific disclosures to a market participant before accepting any data from that market participant. These disclosures would help market participants understand the risks and protections available to them.

6. Chief Compliance Officer

As discussed above, proposed Rule 13n–11 would require that an SDR's CCO establish certain policies relating to noncompliance issues as well as prepare and submit to the Commission an annual compliance report. Proposed Rule 13n–11 would also require that an annual financial report be prepared and filed with the Commission. The information that would be collected under this rule would help ensure compliance by SDRs of the provisions of the Exchange Act and the rules and regulations thereunder as well as assist the Commission in ensuring such compliance.

7. Other Provisions Relevant to the Collection of Information

As discussed above, (1) proposed Rule 13n–4(c)(1) would require SDRs to comply with certain requirements relating to market access to services and data including establishment of certain policies and procedures or clearly stated objective criteria; (2) proposed Rule 13n–4(c)(2)(iv) would require SDRs to establish policies and procedures regarding the skills and expertise of an SDR's senior management and members of the board or committee that has the authority to act on behalf of the board; (3) proposed Rule 13n–4(c)(3) would require SDRs to establish and enforce written conflict of interest policies and procedures as well as require ongoing identification and mitigation of conflicts and to establish written policies and procedures regarding their noncommercial and commercial use of transaction information; (4) proposed Rule 13n–5(b)(6) would require that SDRs establish dispute resolution procedures and facilities reasonably designed to effectively resolve disputes regarding the accuracy of the transaction data and positions that are recorded in the SDR; and (5) proposed Rule 13n–9 would require SDRs to establish policies, procedures, and safeguards regarding privacy and misappropriation or misuse of certain information. The information that would be collected pursuant to these provisions would help ensure a transparent and orderly marketplace for SBSs, protect users' privacy, and enable Commission oversight of these programs.

C. Respondents

1. Registration Requirements and Form SDR

The registration requirements of proposed Rules 13n–1, 13n–3, 13n–11(a), and Form SDR would apply to every SDR. The Dodd-Frank Act does not limit the number of persons that may register as SDRs. Commission staff is aware of five persons that have indicated the ability and/or interest in providing SDR services for SBS. For PRA purposes, the Commission believes that it is reasonable to expect that, at most, ten persons may register with the Commission as SDRs.[207] Furthermore, for PRA purposes, the Commission preliminarily estimates that three such persons may be "non-resident" SDRs subject to the additional requirements of proposed Rule 13n–1(g).

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

The duties, data collection and maintenance, and automated systems requirements of proposed Rules 13n–4(b), 13n–5, and 13n–6 would, as a general matter, apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

3. Recordkeeping

The recordkeeping requirements of proposed Rule 13n–7 would apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

4. Reports and Reviews

The reports and review requirements of proposed Rules 13n–6(b)(2) and 13n–

[207] In order to withdraw from registration, SDRs would be required to file a notice of withdrawal with the Commission and update any inaccurate information by filing an amended Form SDR with the Commission prior to the withdrawal. However, since the Commission expects a total of only 10 SDRs to register, we estimate that there would be fewer than 10 potential respondents for this requirement and therefore this requirement also would not constitute part of the collection of information.

8 would apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

5. Disclosure

The disclosure requirements of proposed Rule 13n–10 would apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

6. Chief Compliance Officer

The provisions regarding CCOs set forth in proposed Rule 13n–11 would apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

7. Other Provisions Relevant to the Collection of Information

The remaining requirements of the proposed rules relevant to the collection of information, specifically proposed Rules 13n–4(c), 13n–5(b)(6) and 13n–9, would apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

The Commission seeks comment regarding the accuracy of any of the above figures.

D. Total Annual Reporting and Recordkeeping Burden

1. Registration Requirements and Form SDR

Proposed Rules 13n–1(b) and 13n–3(a), relating to successor SDRs as described above, would require SDRs to apply for registration using Form SDR and file such form electronically in tagged data format with the Commission in accordance with the instructions contained therein. Further, proposed Rule 13n–1(f) would require SDRs to designate an agent for service of process on Form SDR, and proposed Rule 13n–11(a) would require SDRs to identify its CCO on Form SDR. For purposes of the PRA, the Commission estimates that it would take an SDR approximately 400 hours to complete the initial Form SDR with the information required and in compliance with these proposals. The Commission bases this estimate on the number of hours necessary to complete Form SIP.[208] As noted above, the Commission currently estimates that 10 entities will be subject to this burden. Accordingly, the Commission estimates that the one-time initial registration burden for all SDRs would be approximately 4000 burden hours. The Commission believes that SDRs will prepare Form SDR internally, but the Commission solicits comment as to whether SDRs will do so or outsource this requirement.

Under proposed Rule 13n–1(g) a non-resident SDR must certify on Form SDR and provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with access to the books and records of such SDR and can, as a matter of law, submit to onsite inspection and examination by the Commission. This creates additional burdens for non-resident SDRs. We estimate, based on the similar requirements of Form 20–F, that this additional burden will add 3 hours and $900 in outside legal costs per respondent.[209] As stated above, the Commission believes that there will be three respondents to this collection, for a total additional burden for non-resident SDRs to comply with proposed Rule 13n–1(g) of 9 hours and $2700.[210]

SDRs would also be required to amend Form SDR pursuant to proposed Rule 13n–1(e) annually as well as when information in certain enumerated items is or becomes inaccurate. Amendments are also required in certain situations involving successor SDRs outlined above pursuant to proposed Rule 13n–3(b). For purposes of Form SIP, the Commission considered amendments to be part of the 400 hours of the annual burden.[211] However, the Commission believes that Form SDR will have different initial burden as compared to the ongoing annual amendments. When amendments to Form ADV were proposed in 2008, the Commission estimated that the hours burden for amendments to be roughly 3% of the initial burden.[212] The Commission believes that this ratio would be the same for filers of Form SDR. Thus, the Commission estimates that the ongoing annualized burden for complying with these registration amendment requirements would be approximately 12 burden hours for each SDR per amendment and approximately 120 burden hours for all SDRs per amendment. Proposed Rule 13n–1(e) would require one annual compulsory amendment on Form SDR as well as interim amendments on Form SDR when reported information thereto is or becomes inaccurate or, under proposed Rule 13n–3(b), in certain circumstances involving successor SDRs detailed above. When Form ADV was amended earlier this year, the Commission estimated that there were 2 amendments per year for that form.[213] The Commission believes that would be a reasonable estimate for the number of amendments per year to correct inaccurate information or in situations involving successor SDRs. Including the required annual amendment, the Commission estimates that respondents will be required to file on average 3 amendments per year. Therefore, the Commission estimates that each respondent will have an average annual burden of 36 hours for a total estimated average annual burden of 360 hours.[214] The Commission believes, based on discussions with industry participants, that this work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

As outlined above, under proposed Rules 13n–4(b)(2) and (4) and 13n–5, SDRs would be required to accept and maintain data received from third parties including transaction data and to calculate and maintain position information. SDRs would be required, pursuant to proposed Rule 13n–4(b)(5), to provide direct electronic access to the Commission or its designees and, pursuant to proposed Rule 13n–4(b)(9), make available data obtained by the SDR to other parties, including certain government bodies. SDRs would also have an obligation under proposed Rules 13n–4(b)(3) and 13n–5(b)(1)(iii) to

[208] The Commission calculated in 2008 that Form SIP takes 400 hours to complete. 73 FR 34060 (June 16, 2008) (outlining the most recent Commission calculations regarding the PRA burdens for Form SIP). While the requirements of Form SIP and Form SDR are not identical, the Commission believes that there is sufficient similarity for PRA purposes that the burden would be roughly equivalent.

[209] Exchange Act Release No. 49616 (Apr. 26, 2004); 69 FR 24016 (Apr. 30, 2004). The $900 figure is based on an estimate of $400 an hour for legal services.

[210] The base burden of 4000 hours includes resident and non-resident SDRs. The 9 hour and $2700 figures are the additional costs as a result of proposed 13n–1(g) for non-resident SDRs not already accounted for in the 4000 hour figure.

[211] "This annual reporting and recordkeeping burden does not include the burden hours or cost of amending a Form SIP because the Commission has already overstated the compliance burdens by assuming that the Commission will receive one initial registration pursuant to Rule 609 on Form SIP a year." *Id.*

[212] Investment Advisors Act Release No. 2711 (Mar. 3, 2008); 73 FR 13958 (Mar. 14, 2008). In that proposal, the initial burden was calculated to be 22.25 hours per respondent and 0.75 hours per respondent for amendments.

[213] Investment Advisors Act Release No. 3060 (July 28, 2010); 75 FR 49234 (Aug. 12, 2010). Although this information is based upon investment advisor statistics, the Commission believes that for these purposes the differences between investment advisors and SDRs are minimal.

[214] The 36 hours figure is the result of the estimated burden per SDR per amendment (12) times the estimated number of amendments per year (3). The 360 hour figure is the result of the estimated burden per SDR (36) times the number of SDRs (10).

establish and maintain written policies and procedures reasonably designed to confirm and to satisfy itself by reasonable means that the transaction data that has been submitted to the SDR is accurate. Also, proposed Rule 13n–5(b)(4) would require that SDRs maintain the transaction data for not less than five years after the applicable SBS expires and historical positions for not less than five years.[215] Under the proposal, this obligation would continue even if an SDR withdraws from registration or ceases doing business.[216] SDRs would be required to make and keep current a plan to ensure compliance with this requirement.[217]

The Commission estimates that the average one-time start-up burden per SDR of establishing systems compliant with all of these requirements, including the recordkeeping requirements of proposed Rules 13n–5(b)(4), (7), and (8), would be 42,000 hours and $10 million in information technology costs. This estimate is based on the Commission's discussions with market participants. Based on the expected number of respondents, the Commission estimates a total start-up cost of 420,000 hours and $100 million in information technology costs. Based on discussions with potential respondents, the Commission further estimates that the average ongoing annual costs of these systems to be 25,200 hours and $6 million per respondent or a total of 252,000 hours and $60 million for a total ongoing annual burden. The Commission solicits comment as to the accuracy of this information.

Under proposed Rule 13n–4(b)(10), before sharing information with any entity described in new Exchange Act Section 13(n)(5)(G), an SDR must obtain written confidentiality and indemnification agreements. The Commission estimates that these agreements will require four hours per respondent in outside legal costs to create for an initial outside cost of $1600 per respondent.[218] As outlined above, the Commission estimates a total of 10 respondents to this requirement. Therefore, the Commission estimates the initial burden for this requirement would be $16,000. The Commission estimates, for PRA purposes only, that SDRs will need to enter into these agreements on an average of at most 1 time per year.[219] The Commission further estimates that each such agreement, subsequent to the initial one, will require an average of 3 hours to draft. Thus, the Commission estimates an average annual burden of 30 hours. The Commission believes that in light of the nature of the parties involved, these agreements will be created internally at the parties entering into them after the initial agreement is drafted or reviewed by outside counsel. The Commission solicits comment as to the accuracy of this information.

Each SDR would also be required to establish, maintain, and enforce written policies and procedures, specifically (1) under proposed Rule 13n–5(b)(1), reasonably designed for the reporting of transaction data to the SDR and to satisfy itself of the accuracy of such information; (2) under proposed Rule 13n–5(b)(2), reasonably designed to calculate positions for all persons with open SBSs for which the SDR maintains records; (3) under proposed Rule 13n–5(b)(3), reasonably designed to ensure data and calculations are accurate; (4) under proposed Rule 13n–5(b)(5), reasonably designed to prevent any provision in an SBS from being invalidated; and (5) under proposed Rule 13n–6(b)(1), reasonably designed to ensure that the SDR's systems provide adequate levels of capacity, resiliency, and security. While these policies and procedures will vary in exact cost, the Commission estimates that such policies and procedures would require an average of 210 hours per respondent per policy and procedure to prepare and implement. The Commission further estimates that these policies and procedures would require $100,000 for outside legal costs.[220] In sum, the Commission estimates the initial burden for all respondents to be 10,500 hours and $1,000,000 for outside legal costs.[221] The Commission based these estimates upon those estimates we used with regards to establishing policies and procedures regarding Regulation NMS.[222] Once these policies and procedures are established, the Commission estimates that it will take on average 60 hours annually to maintain each of these policies and procedures per respondent, with a total estimated average annual burden of 3,000 hours.[223] The Commission believes that this maintenance work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

For each material systems outage, SDRs would be required under proposed Rule 13n–6(b)(3) to promptly notify the Commission and submit to the Commission, after the outage, a written description and analysis of the outage and any remedial measures implemented or contemplated. Also, the definition of "material system outage" refers to a number of documents that would trigger such an event, such as a communication of an outage situation to other external entities and a report or referral of an event to the SDR's board or senior management. The Commission estimates, based on our experience with the ARP program,[224] that the burden imposed by these requirements would be 15.4 hours on average per respondent per year, for a total estimated burden of 154 hours per year.[225] The Commission believes that this work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

[215] This data would be required to be maintained in a place and format that is readily accessible to the Commission and other persons with authority to access or view the information and would also be required to be maintained in an electronic format that is non-rewritable and non-erasable.

[216] Proposed Rule 13n–5(b)(7).

[217] Proposed Rule 13n–5(b)(8).

[218] This is based on an estimated $400 an hour cost for outside legal services. This is the same estimate used by the Commission for these services in the proposed consolidated audit trail rule. Exchange Act Release No. 62174 (May 26, 2010); 75 FR 32556 (June 8, 2010).

[219] As noted above, there are other avenues available to the Commission to share this information with appropriate entities. As a result, for PRA purposes, the Commission believes that SDRs will enter into only a few confidentiality and indemnification agreements.

[220] This figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours of outside legal consulting per policy and procedure, times 5 policies and procedures.

[221] The 10,500 hour figure is the result of the number of hours per policy and procedure (210) times the number of policies and procedures required by these provisions (5), times the number of respondents (10). The $1,000,000 figure is the result of the outside dollar cost per respondent ($100,000) times the number of respondents (10).

[222] Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). The Commission based these estimates on those for non-SRO trading centers rather than for SRO trading centers because we believe that for these purposes non-SRO trading center burdens are more like those that SDRs would face under the proposals.

[223] The 3,000 hour figure is the result of the estimated average hourly burden to maintain each policy and procedure (60), times the total number of policies and procedures required under this requirement (5), times the total number of SDRs (10).

[224] Under the Commission's ARP inspection program of SROs and certain alternative trading systems ("ATS"), the Commission staff conducts on-site inspections and attends periodic technology briefings presented by SRO and ATS staff to the Commission staff, generally covering systems capacity and testing, review of system vulnerability, review of planned system development, and business continuity planning. Under the ARP inspection program, the Commission staff also monitors system failures and planned system changes on a daily basis.

[225] Included in this burden is the time to mark these documents confidential under proposed Rule 13n–6(d), as the Commission believes it is likely that an SDR will mark all documents in this manner.

Proposed Rule 13n–6(b)(4) would require an SDR to notify the Commission in writing at least thirty days before implementation of a planned material systems change. Based on our discussions with market participants, the Commission estimates that there would be an average of 60 such events per respondent per year.[226] Based on the Commission's experience with the ARP program, we estimate that each of these notices would require an average of 2 hours for a total burden for all respondents of 1200 hours annually.[227] The Commission believes that this work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

3. Recordkeeping

SDRs would be required, under proposed Rule 13n–7(a)(1), to make and keep current a record of persons at each office of the SDR that can assist with explaining the SDR's records as well as, under proposed Rule 13n–7(a)(2), to make and keep current a record listing officers, managers, or persons performing similar functions with responsibility for the policies and procedures of the SDR to ensure compliance with the Exchange Act and the rules and regulations thereunder. The Commission estimates that these records would create an initial burden, at a maximum, of 1 hour per respondent, for a total initial burden of 10 hours. The Commission estimates that the ongoing annual burden would be 0.17 hours (10 minutes) per respondent to keep these records current and to store these documents based on our estimates for similar requirements for broker-dealers.[228] This results in a total ongoing annual burden of 1.7 hours. The Commission believes that this work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–7(b) would require each SDR to keep and preserve at least one copy of all documents as shall be made or received by it in the course of its business as such, other than the data collected and maintained pursuant to proposed Rule 13n–5. These records would be required to be kept for a period of not less than five years, the first two years in a place immediately available to Commission staff for inspection and examination.[229] Upon the request of any representative of the Commission, an SDR would be required to furnish promptly documents kept and preserved by it pursuant to proposed Rule 13n–7(a) or (b) to such a representative. Based on the Commission's experience with recordkeeping costs and consistent with prior burden estimates for similar provisions,[230] the Commission estimates that this storage requirement would create an initial burden of 345 hours and $1800 in information technology costs per respondent, for a total initial burden of 3450 hours and $18,000. The Commission further estimates that the ongoing annual burden would be 279 hours per respondent and per respondent for a total ongoing annual burden of 2790 hours. The Commission solicits comment as to the accuracy of this information.

4. Reports and Reviews

Proposed Rule 13n–6(b)(2) would require SDRs to submit to the Commission an annual objective review with respect to those systems that support or are integrally related to the performance of the SDR's activities. If the objective review is performed by an internal department, an objective, external firm would be required to assess the internal department's objectivity, competency, and work performance. Based on its experience with the ARP program, the Commission believes that the annual burden per respondent of conducting an internal audit is approximately 625 hours.[231] As a result, the Commission estimates the total average annual burden to be 8250 hours for all respondents in total for the collection.[232] In addition, based on its experience with the ARP program, the Commission estimates that the annual cost to hire an objective, external firm to be approximately $90,000 per respondent annually. For this reason, the Commission estimates that the average annual cost of complying with proposed Rule 13n–6(b)(2) for all respondents is approximately $900,000.

Under proposed Rule 13n–8, SDRs would be required to report promptly to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines necessary or appropriate for the Commission to perform the duties of the Commission. For PRA purposes only, the Commission estimates that it will request these reports at a maximum of once per year, per respondent. For PRA purposes only, the Commission estimates that these reports would be limited to information already compiled under these proposed rules and thus would require only 1 hour per response to compile and transmit. Thus, the Commission estimates, for PRA purposes only, that the total annual burden for these reports to be 10 hours. The Commission believes that this work, should it be required, will be conducted internally. The Commission solicits comment as to the accuracy of this information.

5. Disclosure

As detailed above, pursuant to proposed Rule 13n–10, SDRs would be required to provide certain disclosures to a market participant. The Commission estimates that the average one-time start-up burden per SDR of preparing this disclosure document is 97.5 hours and $4,400 of external legal costs and $5,000 of external compliance consulting costs, resulting in a total initial burden of 975 hours and $94,000. This estimate reflects the Commission's experience with and burden estimates for similar disclosure document requirements imposed on entities with 1000 or fewer employees and as a result of our discussions with market participants.[233] The Commission expects that this requirement will result in an average annual burden, after the initial creation of the disclosure document, of 1 hour per respondent, with a total annual burden of 10 hours. The Commission believes that this ongoing annual work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

[226] This would account for weekly maintenance that would rise to the standard of a "material systems change" as well as possible planned software upgrades, throughout the year, that would also rise to this level.

[227] Included in this burden is the time to mark these documents confidential under proposed Rule 13n–6(d), as the Commission believes it is likely that an SDR will mark all documents in this manner. The 1200 hour figure is the result of the number of events per year (60), times the estimated average burden hours per notice (2), times the number of SDRs (10).

[228] *See* Exchange Act Release No. 44992 (Oct. 26, 2001); 66 FR 55818 (Nov. 2, 2001) (regarding the collection of information pursuant to Rule 17a–3(a)(21) and (22)).

[229] Under the proposal, this obligation would continue even if the SDR withdraws from registration or ceases doing business. Proposed Rule 13n–7(c).

[230] *See* Exchange Act Release No. 59342 (Feb. 2, 2009); 74 FR 6456 (Feb. 9, 2009).

[231] Further, the Commission's experience with the ARP program has indicated that an additional 200 hours per respondent per year would be required on average to oversee and establish the independent review of these audits.

[232] The 8250 hour figure is the result of the estimate of annual burden per respondent to conduct the internal audit (625), plus the estimate of the annual burden per respondent to oversee and establish the independent review of these audits (200), times the number of SDRs (10).

[233] *See* Investment Advisers Act Release No. 3060 (Aug. 12, 2010); 75 FR 49234 (Aug. 12, 2010).

6. Chief Compliance Officer

Under proposed Rule 13n–11(c)(6) and (7), an SDR's CCO would be responsible for, among other things, establishing procedures for the remediation of noncompliance issues identified by the CCO, and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues. As outlined above, the Commission estimates a total of 10 respondents for this requirement. Based on the Commission's estimates regarding Regulation NMS,[234] it estimates that on average these two requirements will require 420 hours to create and 120 hours to administer per year per respondent, for a total burden of 4200 hours initially and 1200 hours on average, annually.[235] Also based on the estimates regarding Regulation NMS, the Commission estimates that a total of $40,000 in initial outside legal costs will be incurred as a result of this burden per respondent, for a total outside cost burden of $400,000.[236] The Commission solicits comment regarding the accuracy of this information.

A CCO would also be required under proposed Rule 13n–11(d) and (h) to prepare and submit annual compliance reports to the Commission and the SDR's board. Based upon the Commission's estimates for similar annual reviews by CCOs of investment companies,[237] the Commission estimates that these reports will require on average 5 hours per respondent per year. Thus, the Commission estimates a total annual burden of 50 hours. Because the report will be submitted by an internal CCO, the Commission does not expect any external costs. The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–11(f) and (g) would require that annual financial reports be prepared and filed with the Commission. The Commission estimates, based on its experience with entities of similar size to the respondents to this collection, that these reports will generally require on average 500 hours per respondent and cost $500,000 for independent public accounting services. Thus, the Commission estimates a total annual burden of 5000 hours and $5,000,000. The Commission solicits comment as to the accuracy of this information.

The compliance and financial reports submitted to the Commission would be required to be "tagged" pursuant to the requirements of proposed Rule 13n–11. The compliance reports must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual,[238] and the financial reports must be provided in XBRL as required in Rules 405(a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S–T.[239] These requirements would create an additional burden on respondents beyond the preparation of these reports. The Commission preliminarily estimates, based on our experience with other data tagging initiatives, that these requirements would add an additional burden of an average of 54 hours and $22,772 in outside software and other costs per respondent per year, creating an estimated total annual burden of 540 hours and $227,720 to tag the data for both the compliance and financial reports that would be required under proposed Rule 13n–11. The Commission solicits comment as to the accuracy of this information.

7. Other Provisions Relevant to the Collection of Information

Proposed Rule 13n–4(c)(1)(v) would require SDRs to establish, maintain, and enforce certain policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly. As outlined above, the Commission estimates a total of 10 respondents for this requirement. Based on the Commission's estimates regarding Regulation NMS,[240] it estimates that, on average, this requirement will require 210 hours to create and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on average, annually. The Commission also estimates, based on this earlier estimate, that a total of $20,000 in initial outside legal costs will be incurred as a result of this burden per respondent for a total outside cost burden of $200,000.[241] The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–4(c)(1) also would require SDRs to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR. For PRA purposes only, the Commission believes that this should be a lesser burden than for written policies and procedures. Thus, the Commission estimates that this requirement will require 157.5 hours to create, with an associated outside legal cost of $15,000.[242] This would result in an estimate of an initial burden for this requirement for all respondents of 1575 hours and $150,000. The Commission estimates that the average annual burden would be 45 hours each, for a total estimated average annual burden of 450 hours.[243] The Commission believes that this work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–4(c)(2)(iv) would require SDRs to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, to have a clear understanding of their responsibilities, and to exercise sound judgment about the SDR's affairs. As outlined above, the Commission estimates a total of 10 respondents for

[234] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[235] The 420 hour figure is the result of the estimated average hour burden to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average hour burden to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average hour burden per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average hour burden per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

[236] $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, times 2 policies and procedures, times the number of SDRs (10).

[237] *See* Investment Company Act Release No. 25925 (Feb. 5, 2003); 68 FR 7038 (Feb. 11, 2003).

[238] *See* 17 CFR 232.301.

[239] *See* 17 CFR 232.405.

[240] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[241] This figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, for 10 respondents.

[242] These numbers are based on 75% of the 210 hour and $20,000 (50 hours of outside legal costs at $400 an hour) estimates to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). This is based on an estimate that this requirement will create 75% of the burden of creating written policies and procedures under Regulation NMS.

[243] These numbers are 75% of the 60 hour estimates of the ongoing burden regarding one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). This is based on an estimate that this requirement will create 75% of the ongoing burden of written policies and procedures under Regulation NMS.

this requirement. Based on the Commission's estimates regarding similar requirements in Regulation NMS,[244] it estimates that, on average, this requirement will require 210 hours to create and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on average, annually. The Commission also estimates, based on this earlier estimate, that a total of $20,000 in outside legal costs will be incurred as a result of this burden per respondent for a total outside cost burden of $200,000.[245] The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–4(c)(3) outlines the proposed conflicts of interest controls that would be required of SDRs. SDRs would be required to establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest, including establishing, maintaining, and enforcing written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an on-going basis and regarding the SDR's non-commercial and commercial use of the SBS transaction information that it receives. As outlined above, the Commission estimates a total of 10 respondents for this requirement. Based on the Commission's estimates regarding Regulation NMS,[246] it estimates that on average these two requirements will require 420 hours to create and 120 hours to administer per year per respondent, for a total burden of 4200 hours initially and 1200 hours on average annually.[247] Also based on the Regulation NMS estimates, the Commission estimates that a total of $40,000 in initial outside legal costs will be incurred as a result of this burden per respondent for a total outside cost burden of $400,000.[248]

Proposed Rule 13n–5(b)(6) would require that SDRs establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR. For PRA purposes only, the Commission believes that this would be a greater burden than that for written policies and procedures alone. Thus, the Commission estimates that this requirement will require 315 hours to create.[249] There would likely be a need for a respondent to consult with outside legal counsel which the Commission estimates to cost $30,000 per respondent.[250] In total, the Commission estimates an initial burden for all respondents of 3150 hours and $300,000 in outside costs. The Commission estimates the ongoing average annual burden of this requirement to be 90 hours per respondent for a total of 900 hours for the estimated total annual burden for all respondents.[251] The Commission believes that this ongoing work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–9 relates to the privacy requirements that would be required of SDRs. Proposed Rule 13n–9(b)(1) would require SDRs to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from any SBS dealer, counterparty, or any registered entity. As outlined above, the Commission estimates a total of 10 respondents for this requirement. Based on the Commission's estimates regarding Regulation NMS,[252] it estimates that on average these two requirements will require 420 hours to create and 120 hours to administer per year per respondent, for a total burden of 4200 hours initially and 1200 hours on average, annually.[253] Also based on the Regulation NMS estimates, the Commission estimates that a total of $40,000 in initial outside legal costs will be incurred as a result of this burden per respondent for a total outside cost burden of $400,000.[254]

Proposed Rule 13n–9(b)(2) would require SDRs to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse of any confidential data received by the SDR, material, nonpublic information, or intellectual property. At a minimum, this program must limit access to such information, include standards that control persons associated with the SDR in trading for their personal benefit or the benefit of others, and adequate oversight. As outlined above, the Commission estimates a total of 10 respondents for this requirement. Based on the Commission's estimates regarding Regulation NMS,[255] it estimates that on average this requirement will require 210 hours to create and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on average, annually. Also based on the Regulation NMS estimates, the Commission estimates that a total of $20,000 in initial outside legal costs will be incurred as a result of this burden per respondent for a total outside cost burden of $200,000.[256]

[244] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[245] This figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, for 10 respondents.

[246] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[247] The 420 hour figure is the result of the estimated average hour burden to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average hour burden to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average hour burden per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average hour burden per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

[248] This $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, times 2 policies and procedures, times the number of SDRs (10).

[249] This number is 150% of the 210 hour estimate to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). This is based on an estimate that this requirement will create 150% of the burden of creating written policies and procedures under Regulation NMS.

[250] This number is 150% of the estimate of outside legal costs (50 hours) to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers, at an estimate of $400 per hour. *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). This is based on an estimate that this requirement will create 150% of the burden of creating written policies and procedures under Regulation NMS.

[251] These numbers are based on 150% of the 60 hour estimate of the ongoing burden regarding one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). This is based on an estimate that this requirement will create 150% of the ongoing burden of written policies and procedures under Regulation NMS.

[252] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[253] The 420 hour figure is the result of the estimated average hour burden to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average hour burden to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average hour burden per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average hour burden per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

[254] This $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, times 2 policies and procedures, times the number of SDRs (10).

[255] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[256] This figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, for 10 respondents.

E. Collection of Information Is Mandatory

1. Registration Requirements and Form SDR

The collection of information relating to registration requirements and Form SDR is mandatory for all SDRs when registering with the Commission or amending their registration.

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

The collection of information relating to SDR duties, data collection and maintenance, automated systems, and direct electronic access is mandatory for all SDRs.

3. Recordkeeping

The collection of information relating to recordkeeping is mandatory for all SDRs.

4. Reports and Reviews

The collection of information relating to reports and reviews is mandatory for all SDRs.

5. Disclosure

The collection of information relating to disclosure is mandatory for all SDRs.

6. Chief Compliance Officers

The collection of information relating to CCOs is mandatory for all SDRs.

7. Other Provisions Relevant to the Collection of Information

The collection of information relating to other relevant provisions is mandatory for all SDRs.

F. Confidentiality

1. Registration Requirements and Form SDR

The collection of information relating to registration requirements and Form SDR, including attachments thereto, would generally not be kept confidential. However, confidential treatment can be requested by the applicant pursuant to the FOIA and the rules of the Commission thereunder.[257]

[257] "The information will be used for the principal purpose of determining whether the Commission should grant or deny registration to an applicant. Except in cases where confidential treatment is requested by the applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this form will be included routinely in the public files of the Commission and will be available for inspection by any interested person." General instruction 5 of Form SDR.

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

Under the Commission's proposed rules, SDRs would provide participants access to their own SBS data submitted to SDRs. The policies and procedures required under proposed Rules 13n–5(b)(1), (2), (3), and (5) would be made publicly available, as attachments to Form SDR, unless confidential treatment is requested, as explained above. A description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data, as described in proposed Rule 13n–6, would be required to be disclosed to a market participant by the SDR pursuant to proposed Rule 13n–10(b)(3) and would be made publicly available, as exhibits to Form SDR, unless confidential treatment is requested, as explained above.

Upon the request of certain entities described in Exchange Act Section 13(n)(5)(G), information would be made available upon request if the entity making the request agrees to keep that information confidential. Pursuant to proposed Rule 13n–6(d), SDRs may request confidential treatment in connection with the documents provided to the Commission pursuant to proposed Rule 13n–6, and the Commission will accord confidential treatment to those documents to the extent permitted by law. Other than these items, all elements to the collection of data identified above relating to SDR duties, data collection and maintenance, automated systems, and direct electronic access may be provided to Commission staff, but would not be subject to public availability.

3. Recordkeeping

The collection of information relating to recordkeeping would be provided to Commission staff, but not subject to public availability.

4. Reports and Reviews

The collection of information relating to reports and reviews would be provided to Commission staff, but not subject to public availability.

5. Disclosure

The collection of information relating to disclosure would be provided to the party entitled to the disclosure and to Commission staff, but not subject to public availability.

6. Chief Compliance Officer

The financial report required to be provided to the Commission pursuant to proposed Rules 13n–11(f) and (g) may be provided as an exhibit to Form SDR. If this is done, that report would be made publicly available, as an attachment to Form SDR, unless confidential treatment is requested, as explained above. Regarding all other elements of the collection of information relating to the CCO, the collection of information would not be confidential and would be made publicly available.

7. Other Provisions Relevant to the Collection of Information

A list of instances of prohibiting or limiting access to the services of the SDR or the data maintained by an SDR would be required as an exhibit to Form SDR and, as such, would be made publicly available unless confidential treatment is requested as explained above. The policies and procedures that must be reasonably designed to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the SDR as would be required in proposed Rule 13n–4(c)(1)(vi) would be made publicly available, as attachments to Form SDR, unless confidential treatment is requested, as explained above.

The policies and procedures regarding skills and expertise of senior management and certain board or committee members that would be required under proposed Rule 13n–4(c)(2)(iv), conflicts of interest that would be required under proposed Rule 13n–4(c)(3), and privacy under proposed Rule 13n–9(b)(1) would be made publicly available as attachments to Form SDR unless confidential treatment is requested, as explained above. The procedures and a description of the facilities of the SDR for resolving disputes, which would be required pursuant to proposed Rule 13n–5(b)(6), would be made publicly available, as exhibits to Form SDR, unless confidential treatment is requested, as explained above. A description of the SDR's policies relating to misuse of information, which would be required pursuant to proposed Rule 13n–9(b)(2), would be made publicly available, as an exhibit to Form SDR, unless confidential treatment is requested, as explained above. Pursuant to proposed Rule 13n–10(b), the SDR would disclose to market participants its policies and procedures described in proposed Rules 13n–5(b)(6) and 13n–9(b)(1).

Regarding all other elements of the collection of information relating to

other relevant provisions, the collection of information would be provided to Commission staff, but not subject to public availability.

G. Retention Period of Recordkeeping Requirements

With regards to proposed Rule 13n–5, proposed Rule 13n–5(b)(4) would require that SDRs maintain the transaction data for not less than five years after the applicable SBS expires and historical positions for not less than five years. This data would be required to be maintained in a place and format that is readily accessible to the Commission and other persons with authority to access or view the information and would also be required to be maintained in an electronic format that is non-rewritable and non-erasable.

Pursuant to proposed Rule 13n–7(b) an SDR would be required to preserve at least one copy of all documents as shall be made by it in the course of its business as such, including all records that would be required under the Exchange Act and the rules and regulations thereunder. These records would be required to be kept for a period of not less than five years, the first two years in a place immediately available to Commission staff for inspection and examination.

H. Request for Comment

The Commission invites comment on these estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission requests comment in order to: (a) Evaluate whether the collection of information is necessary for the proper performance of our functions, including whether the information will have practical utility; (b) evaluate the accuracy of our estimate of the burden of the collection of information; (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (d) evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–35–10. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File No. S7–35–10, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE., Washington, DC 20549–1090. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VI. Consideration of Costs and Benefits

Earlier this year, Congress passed the Dodd-Frank Act in response to the recent financial crisis. Among other things, the Dodd-Frank Act is designed to strengthen oversight, improve consumer protections, and reduce systemic risks throughout the financial system. Title VII of the Dodd-Frank Act specifically addresses the OTC derivatives markets, including the market for SBSs. Pursuant to Subtitle B of Title VII, the Commission is the designated regulator for SBSs.

The swap markets have been described as being opaque [258] and transaction-level data is not publicly available. One of the purposes of the Dodd-Frank Act is to improve the transparency of the OTC derivatives market.[259] In order to shed light on the SBS market, Title VII requires the Commission to undertake a number of rulemakings to implement the regulatory framework for SBSs that is set forth in the legislation, including the reporting of SBS transactions.

The Commission views the process of implementing SBS data reporting as incremental. On October 13, 2010, the Commission adopted an interim final temporary rule that requires certain SBS dealers and other parties to report any SBSs entered into prior to the July 21 passage of the Dodd-Frank Act as the first step in that process.[260] The interim final temporary rule provides for the reporting of pre-enactment SBSs and enables the Commission to obtain data on pre-enactment SBSs until registered SDRs are operating and able to accept the reports.

Today, the Commission is proposing new rules and a new form that provide for the registration of SDRs and establish and expand upon the core principles and duties applicable to registered SDRs. SDRs are intended to play a critical role in enhancing transparency in the SBS market, bolstering market efficiency and liquidity, promoting standardization, and reducing systemic risks. In conjunction with recordkeeping and reporting rules to be proposed with respect to other SBS market entities, such as SB SEFs, SBS exchanges, SBS dealers, and major SBS participants, the proposed SDR rules will lead to a more robust, transparent environment for the market for SBSs.[261]

Proposed Rules 13n–1 through 13n–3 and proposed Form SDR establish the mechanism by which entities meeting the definition of a "security-based swap data repository" must register as such pursuant to Exchange Act Section 13(n). Proposed Rules 13n–4 through 13n–10 prescribe the duties and core principles for SDRs and provide further guidance with respect to compliance with such duties and core principles. Finally, proposed Rule 13n–11 provides for the designation of and imposes obligations on SDR CCOs.

The Commission is sensitive to the costs and benefits imposed by its rules, and it has identified the following costs and benefits. In particular, the Commission focuses our discussion below on the costs and benefits of the decisions made by the Commission to fulfill the mandates of the Dodd-Frank Act within the permitted discretion, rather than the mandates of the Dodd-Frank Act. However, to the extent that the Commission's discretion is aligned to take full advantage of the benefits intended by the Dodd-Frank Act, the

[258] With respect to CDS, for example, the Government Accountability Office found that "comprehensive and consistent data on the overall market have not been readily available," that "authoritative information about the actual size of the CDS market is generally not available," and that regulators currently are unable "to monitor activities across the market." Government Accountability Office, "Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps," GAO–09–397T (March 2009), at 2, 5, 27. *See* Robert E. Litan, "The Derivatives Dealers' Club and Derivatives Market Reform," Brookings Institution (April 7, 2010) at 15–20. *See also* Michael Mackenzie, June 25, 2010, *Era of an opaque swaps market ends,* Fin. Times, June 25, 2010.

[259] *See, e.g.,* 156 Cong. Rec. S5915 (daily ed. July 15, 2010) (statement of Sen. Reed) ("A major problem with derivatives is that they have not been regulated nor well-understood by even those buying and selling them. The legislation changes that and brings transparency to the marketplace for swaps * * * by requiring the reporting of the terms of these contracts to regulators and market participants.").

[260] Reporting of Security-Based Swap Transaction Data, Exchange Act Release No. 63094 (Oct. 13, 2010), 75 FR 64643 (Oct. 20, 2010).

[261] *See, e.g.,* 156 Cong. Rec. S5920 (daily ed. July 15, 2010) (statement of Sen. Lincoln) ("These new 'data repositories' will be required to register with the CFTC and the SEC and be subject to the statutory duties and core principles which will assist the CFTC and the SEC in their oversight and market regulation responsibilities.").

two types of benefits are not entirely separable. The Commission requests that commenters provide data and any other information or statistics that the commenters relied on to reach any conclusions on such estimates.

A. Registration Requirements and Form SDR

The Commission is proposing Rule 13n–1 to set forth the information that must be submitted by a person on new Form SDR to register as an SDR and also provides for amendments to Form SDR, including interim amendments and required annual amendments that must be filed within 60 days after the end of each fiscal year. Each non-resident SDR would be required to certify on Form SDR and provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with access to the books and records of such SDR and can submit to onsite inspection and examination by the Commission. Proposed Rule 13n–2 sets forth the process by which a registered SDR would withdraw its registration and proposed Rule 13n–3 sets forth the process for a succession of registration for SDRs.[262] The proposed rules and form are in response to the mandate of the Dodd-Frank Act, which, among other things, requires the Commission to prescribe, by rule, the process for registration to be used by SDRs. The proposed rules and form prescribe information and documents to be submitted by SDRs in order to register with the Commission.

1. Benefits

The proposed rules and form described in this section provide for the registration of SDRs, and the withdrawal from registration and/or successor registration of SDRs. Congress enacted the new registration requirements as part of the Dodd-Frank Act in order to bring transparency to the SBS market. The registration process is intended to assist the Commission in overseeing and regulating the SBS market. The requirement that a non-resident SDR certify and provide an opinion of counsel that it can provide the Commission with access to its books and records and submit to inspection and examination will allow the Commission to better evaluate an SDR's ability to meet the requirements for registration and ongoing supervision.

The proposed rules and form described in this section would be issued pursuant to specific grants of rulemaking authority in the Dodd-Frank Act[263] and are designed to further the legislation's goals by enhancing the Commission's ability to oversee the marketplace for SBSs, which is critical to the continued integrity of our markets. The information to be provided in Form SDR is necessary in order to enable the Commission to assess whether an applicant has the capacity to perform the duties of an SDR and to comply with the duties, core principles, and other requirements imposed on registered SDRs pursuant to Exchange Act Section 13(n) and the rules and regulations promulgated thereunder.

The Commission solicits comment on the benefits associated with the registration-related rules and new Form SDR. The Commission specifically requests comment on whether it should require different and/or additional information to be provided on the form and the frequency with which routine amendments should be filed. Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The Commission preliminarily anticipates that the primary costs to SDRs from the proposed registration-related rules and form result from the requirement to complete Form SDR and any amendments thereto.

As discussed above, the Commission estimates that the average initial paperwork cost of SDR registration would be 400 hours per SDR and the average ongoing paperwork cost of interim and annual updated Form SDR would be 36 hours for each registered SDR.[264] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $584,000[265] and the aggregate ongoing estimated dollar cost per year would be $49,080[266] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost for each non-resident SDR to provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to its books and records and submit to onsite inspection and examination would be 3 hours and $900 per SDR. Assuming a maximum of three non-resident SDRs,[267] the aggregate one-time estimated dollar cost would be $5,544.[268]

The Commission solicits comment on the costs associated with the registration-related rules and new Form SDR. The Commission specifically requests comment on the estimated number of respondents that would be filing proposed Form SDR and the initial costs associated with completing the registration form and the ongoing annual costs of completing the required annual amendments. Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect these initial costs to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.[269]

B. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

Proposed Rules 13n–4(b)(2)—(7), (9), and (10), 13n–5, and 13n–6 include

[262] *See supra* Sections III.A—III.C.

[263] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(1)).

[264] *See supra* Section V.D.1.

[265] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney and a Compliance Clerk. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour and the cost of a Compliance Clerk is $59 per hour. Thus, the total one-time estimated dollar cost of complying with the initial registration-related requirements is $58,400 per SDR and $584,000 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 150 hours) + (Compliance Clerk at $59 per hour for 250 hours) × (10 registrants) = $584,000.

[266] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney and a Compliance Clerk. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour and the cost of a Compliance Clerk is $59 per hour. Thus, the total ongoing estimated dollar cost of complying with the registration amendment requirements is $4,908 per year per SDR and $49,080 per year for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 12 hours) + (Compliance Clerk at $59 per hour for 24 hours) × (10 registrants) = $49,080.

[267] *See supra* Section V.C.1.

[268] The Commission estimates that an SDR will assign these responsibilities to an Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $316 per hour. Thus, the total ongoing estimated dollar cost of complying with the registration amendment requirements is $1,848 per year per SDR and $5,544 per year for all SDRs, calculated as follows: ($900 for outside legal services + (Attorney at $316 per hour for 3 hours)) × (3 non-resident registrants) = $5,544.

[269] The Commission notes that industry representatives have indicated that, based on their knowledge of existing SEC registration forms for other types of registrants, such as clearing agencies, they do not believe that completion of registration forms would impose a significant cost.

various requirements relating to SDRs' information technology systems. Proposed Rules 13n–4(b)(2)—(7), 13n–5, and 13n–6 are intended to codify and elucidate the statutorily mandated duties and core principles relating to an SDR's collection, maintenance, and analysis of transaction data and other records, including upon an SDR's cessation of business.[270]

Under proposed Rule 13n–4(b)(2) and (4), an SDR would be required to accept and maintain transaction data as required by proposed Rule 13n–5.[271] Proposed Rule 13n–4(b)(5) states that each SDR must provide direct electronic access to the Commission or any designee of the Commission. Proposed Rule 13n–4(b)(9) would require an SDR to make available all data obtained by the SDR upon the request of certain government bodies, such as the CFTC and the Department of Justice, on a confidential basis and after notification to the Commission.

Proposed Rule 13n–5 would establish requirements for transaction data collection and maintenance. Proposed Rule 13n–5(b), among other things, would require an SDR to promptly record transaction data, and to establish, maintain, and enforce written policies and procedures (1) reasonably designed to calculate positions for all persons with open SBSs for which the SDR maintains records; (2) reasonably designed to ensure that the transaction data and positions that it maintains are accurate; and (3) reasonably designed to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR. Proposed Rule 13n–5(b)(4) would establish requirements related to the time periods for which an SDR must preserve, maintain, and make accessible transaction data. Proposed Rule 13n–5(b)(7) would require an SDR that ceases doing business to preserve, maintain, and make accessible the data and records described above for the remainder of the time period required by proposed Rule 13n–5. Proposed Rule 13n–5(b)(8) would require SDRs to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with proposed Rule 13n–5(b)(7).

Proposed Rule 13n–6(b) would require SDRs to establish policies and procedures relating to the SDRs' system capacity, resiliency, and security. Such policies and procedures must include periodic capacity stress tests, reviews of system vulnerability, and adequate contingency and disaster recovery plans. SDRs would be required to promptly notify the Commission of material systems outages and submit a description and analysis of the outages within five business days, and notify the Commission in writing at least thirty calendar days before planned material systems changes.

1. Benefits

The SDR provisions in the Dodd-Frank Act depend on the accuracy of the data maintained by registered SDRs. Exchange Act Section 13(n) specifically instructs the Commission to "prescribe data collection and maintenance standards for" SDRs. The proposed rules related to an SDR's information technology and related policies and procedures are designed to facilitate accurate data collection and retention with respect to SBSs in order to promote transparency with respect to the market for SBSs, as well as facilitate orderly execution and confirmation of SBS transactions and standardization of such transactions.

The proposed rules discussed in this section would be issued pursuant to specific grants of rulemaking authority in the Dodd-Frank Act[272] and are designed to further the legislation's goals by enhancing the Commission's ability to oversee the marketplace for SBSs, which is critical to the continued integrity of our markets. The ability of the Commission and other regulators to monitor risk and detect fraudulent activity depends on having access to market data. In particular, the direct electronic access requirement described in proposed Rule 13n–4(b)(5) will permit the Commission, its designees, and other regulators to carry out these responsibilities in an effective and efficient manner. The proposed requirement that each SDR make and keep current a plan to ensure that SBS data recorded in such SDR continues to be maintained is essential to ensure that regulators will continue to have access to and the ability to analyze SBS data in the event that the SDR ceases to do business. The proposed provisions relating to material systems outages are important to ensure that the Commission is apprised when an SDR's ability to accept, maintain, and provide access to regulators and market participants to accurate and timely transaction data may be impaired.

The requirements in the proposed rules are likely to create various benefits including increased transparency and reduction of systemic risk by providing the Commission and other regulators to access SBS market information. In addition, this data will enhance the Commission's ability to detect and deter fraudulent and manipulative activity and other trading abuses in connection with the derivatives markets, conduct inspections and examinations to monitor the financial responsibility and soundness of market participants, and verify compliance with the statutory requirements and duties of SDRs. For systemic risk monitoring, it is necessary that the Commission and other regulators have access to information regarding all cleared and uncleared trades of market participants and their positions. Pursuant to the proposed rules, in conjunction with Regulation SBSR,[273] SDRs will receive and maintain systemically important information from multiple trade execution facilities, SBS clearing agencies, and other market participants. The resulting benefit will derive from the increased transparency on where exposures to risk reside in financial markets, which will allow regulators to monitor and act before the risks become systematically relevant. Therefor, SDRs will help achieve systemic risk monitoring.

Benefits also may accrue from the Commission's and other regulators' ability to use SBS data in order to oversee the SBS market for illegal conduct. Proposed Rule 13n–5 requires SDRs to satisfy itself of the accuracy of transaction data and preserve such data for a sufficient period so that transaction level data is available to assist regulators in analyzing data to detect market abuse. The proposed rule also requires SDRs to accept data regarding all SBSs in an asset class if the SDR accepts data on any SBS in that particular asset class. These requirements may help the Commission and other regulators to identify fraudulent or other predatory market activity.

The richness of data collected by SDRs also will facilitate market analysis studies by regulators. Periodic reviews of market behavior through the study of SBS transactions will help identify the costs and benefits of Commission rules that can be used to evaluate the overall efficiency of market regulation. Such studies can inform the Commission and other regulators on potential changes to the rules to improve their efficiency.

Central repositories of information also may create benefits from non-core duties, such as facilitating the reporting of life cycle events, asset servicing, or payment calculations. These activities

[270] *See supra* Section III.D—III.F.

[271] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(5)(D)(i)).

[272] *See* Public Law 111–203, § 763(i) (adding Exchange Act Sections 13(n)(4) and (5)).

[273] *See* Regulation SBSR Release, *supra* note 9.

may be less costly to perform when SBS market transaction data is centrally located and accessible.

Since Exchange Act Section 13(n) and the rules and regulations promulgated thereunder allow for multiple SDRs to register with the Commission, potentially within the same asset class, with each collecting data from a subset of market participants, proposed Rule 13n–4(b)(2) requires all SDRs to accept data as prescribed by Regulation SBSR [274] and proposed Rule 13n–5(b)(1) requires all SDRs to maintain the transaction data in a format that is readily accessible to the Commission and other persons with authority to access or view such information. The effect of these provisions, in conjunction with the requirements of Regulation SBSR,[275] is that the same transaction data will be accepted across SBS market entities (including exchanges, SB SEFs, clearing agencies, SBS dealers, and major SBS participants) and service providers and each SDR will maintain the transaction data in a manner that allows the Commission and others with authority to access and view such data. Thus, the rule both attempts to maintain benefits of competition and allow proper aggregation of market-wide SBS data.

The reliability of the aggregation of market-wide SBS data depends upon data integrity and consistent structuring across all service providers. The proposed rule requires an SDR to create policies and procedures such that all transactions are recorded accurately. Aggregating data across SDRs by regulators and other users of such data will benefit to the extent that policies and procedures result in more accurate data reporting.

The Commission solicits comment on the benefits related to Rules 13n–4(b)(2)—(7), (9), and (10), 13n–5, and 13n–6. The Commission specifically requests comment on whether any additional benefits would accrue if the Commission imposed further, more specific technology-related requirements. Are there alternatives that the Commission should consider? Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The Commission anticipates that the primary costs to SDRs from the proposed rules described in this section would relate to the cost of developing and maintaining systems to collect and store SBS transaction data. Registered SDRs also would need to develop, maintain, and ensure compliance with related policies and procedures and provide applicable training.

As discussed above, the Commission estimates that the average initial paperwork cost associated with creating the SDR information technology systems would be 42,000 hours and $10,000,000 for each SDR and the average ongoing paperwork cost would be 25,200 hours and $6,000,000 per year for each SDR.[276] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $200,020,000 [277] and the aggregate ongoing estimated dollar cost per year would be $120,012,000 [278] to comply with the proposed rules. Based on conversations with industry representatives, the Commission estimates that the cost imposed on SDRs to provide direct electronic access to the Commission should be minimal as SDRs likely have or will establish comparable electronic access mechanisms to enable market participants to provide data to SDRs and review transactions to which such participants are parties.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–4(b)(10) would be $1,600 for each SDR and the average ongoing paperwork cost would be 3 hours for each SDR.[279] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $16,000 [280] and the aggregate ongoing estimated dollar cost per year would be $9,480 [281] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with developing policies and procedures necessary to comply with Rules 13n–5(b)(1), (2), (3), and (5) and 13n–6(b)(1) would be 1,050 hours and $100,000 for each SDR and the average ongoing paperwork cost would be 300 hours per year for each SDR.[282] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $3,926,250 [283] and the aggregate ongoing estimated dollar cost per year would be $908,400 [284] to comply with the proposed rules.

[274] *See* Regulation SBSR Release, *supra* note 9.

[275] *See id.*

[276] *See supra* Section V.D.2.

[277] The Commission estimates that an SDR will assign these responsibilities to an Attorney, a Compliance Manager, a Programmer Analyst, and a Senior Business Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $316 per hour, a Compliance Manager is $294 per hour, a Programmer Analyst is $190 per hour, and a Senior Business Analyst is $234 per hour. Thus, the total initial estimated dollar cost would be $20,002,000 per SDR and $200,020,000 for all SDRs, calculated as follows: ($10,000,000 for information technology systems + (Attorney at $316 per hour for 7,000 hours) + (Compliance Manager at $294 per hour for 8,000 hours) + (Programmer Analyst at $190 per hour for 20,000 hours) + (Senior Business Analyst at $234 per hour for 7,000 hours)) × 10 registrants = $200,020,000.

[278] The Commission estimates that an SDR will assign these responsibilities to an Attorney, a Compliance Manager, a Programmer Analyst, and a Senior Business Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $316 per hour, a Compliance Manager is $294 per hour, a Programmer Analyst is $190 per hour, and a Senior Business Analyst is $234 per hour. Thus, the total ongoing estimated dollar cost would be $12,001,200 per SDR and $120,012,000 for all SDRs, calculated as follows: ($6,000,000 for information technology systems + (Attorney at $316 per hour for 4,200 hours) + (Compliance Manager at $294 per hour for 4,800 hours) + (Programmer Analyst at $190 per hour for 12,000 hours) + (Senior Business Analyst at $234 per hour for 4,200 hours)) × 10 registrants = $120,012,000.

[279] *See supra* Section V.D.2.

[280] $1,600 for outside legal services × 10 registrants = $16,000.

[281] The Commission estimates that an SDR will assign these responsibilities to an Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $316 per hour. Thus, the total ongoing estimated dollar cost would be $948 per SDR and $9,480 for all SDRs, calculated as follows: (Compliance Attorney at $316 per hour for 3 hours) × 10 registrants = $9,480.

[282] *See supra* Section V.D.2.

[283] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour, the cost of an Attorney is $316 per hour, the cost of a Senior Systems Analyst is $251 per hour, and the cost of an Operation Specialist is $114 per hour. Thus, the total initial estimated dollar cost would be $392,625 per SDR and $3,926,250 for all SDRs, calculated as follows: ($100,000 for outside legal services + (Compliance Manager at $294 per hour for 385 hours) + (Attorney at $316 per hour for 435 hours) + (Senior Systems Analyst at $251 per hour for 115 hours) + (Operations Specialist at $114 per hour for 115 hours)) × 10 registrants = $3,926,250.

[284] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and an Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour and the cost of an Attorney is $216 per hour. Thus, the total ongoing estimated dollar cost would be $90,840 per SDR and $908,400 for all SDRs,

Continued

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with the proposed Rules 13n–6(b)(3) and (4) would be 135.4 hours for each SDR.[285] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $368,965 to comply with the proposed rules.[286]

The Commission believes that persons currently operating as SDRs may have developed and implemented aspects of the proposed rules already. However, such persons currently are not subject to regulation by the Commission and may not be subject to regulation or oversight by other regulatory bodies and may need to enhance their information technology systems and related policies and procedures to comply with the proposed rules. However, the Commission does not believe that the one-time cost of such changes will be significant. The ongoing annual costs for persons currently operating as SDRs likely will be consistent with the estimates provided above.

Exchange Act Section 13(n) and the proposed rules and regulations promulgated thereunder allow for multiple SDRs to register with the Commission, potentially within the same asset class, with each SDR collecting data from a subset of market participants. While multiple SDRs per asset class will allow for market competition to decide how data is collected, it may hinder market-wide data aggregation due to coordination costs, particularly if market participants adopt incompatible reporting standards and practices. The proposed rules do not specify a particular reporting format or structure, which may create the possibility that entities reporting to SDRs, and regulators or other market participants accessing transaction data, will have to accommodate different data standards and develop different systems to accommodate each. This may result in increased costs for reporting entities and users of transaction data.

The costs associated with aggregating data across multiple SDRs by regulators and other users of such data will increase to the extent that SDRs choose to use different identifying information for transactions, counterparties, and products. Data aggregation costs also could accrue to the extent that there is variation in the quality of data maintained across SDRs. Each SDR has discretion over how to implement its policies and procedures in the recording of reportable data, and variations in quality may result. Since aggregated data used for surveillance and risk monitoring requires that the underlying components are provided with the same level of accuracy, variations in the quality of data could be costly if subsequent interpretations of analysis based on the data suffer from issues of integrity. To the extent that market competition among SDRs impacts profit margins and the level of resources devoted to collecting and maintaining transaction data, there is an increased likelihood of variations in the quality of reported data and aggregation of data across multiple SDRs may be difficult.

The Commission solicits comment on the costs related to proposed Rules 13n–4(b)(2)—(7), (9), and (10), 13n–5, and 13n–6. The Commission specifically requests comment on the initial and ongoing costs associated with establishing and maintaining the technology systems and related policies and procedures. Are there additional costs to creating an SDR that the Commission should consider? Are there alternatives that the Commission should consider? Do the estimates accurately reflect the cost of storing data in a convenient and usable electronic format for the required retention period? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the initial and ongoing costs necessary to comply with these proposed rules to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

C. Recordkeeping

Proposed Rule 13n–7 would require an SDR to make and keep certain records relating to its business and retain a copy of records made by the SDR in the course of its business for a period of not less than five years, the first two years in a place that is immediately available to the staff of the Commission for inspection and examination. The proposed rule also would require an SDR that ceases doing business to preserve, maintain, and make accessible the records required to be made and kept pursuant to the rule for the remainder of the time period required by proposed Rule 13n–7.[287]

1. Benefits

The rule discussed in this section is designed to further the Dodd-Frank Act's goals by enhancing the Commission's ability to oversee SDRs, which are critical components of the new regulatory scheme governing SBS. The proposed rule will assist the Commission in monitoring whether an SDR is complying with Exchange Act Section 13(n) and the rules and regulations promulgated thereunder. In addition, the rule is designed to reduce systemic risks by requiring the making and keeping of records pertaining to the day-to-day business of SDRs. Finally, the legislative goals of Title VII depend on the ongoing operation of SDRs as the source for transaction data, and the recordkeeping requirements contained in the proposed rule will enhance the ability of the Commission and other regulators to monitor the financial responsibility and soundness of SDRs.

To the extent that the proposed rule standardizes the business recordkeeping practices of SDRs, regulators will benefit by being able to perform more efficient, targeted inspections and examinations with an increased likelihood of identifying improper conduct at earlier stages in the inspection or examination. In addition, SDRs should benefit from standardized recordkeeping requirements by having their operations interrupted by inspections or examinations for shorter time periods. Both regulators and SDRs should benefit from standardized recordkeeping requirements to the extent that uniform records will enable regulators and SDRs to know what records the SDRs should have on hand.

The Commission solicits comment on the benefits related to proposed Rule 13n–7. Would additional benefits accrue if the Commission imposed different or additional recordkeeping requirements and, if so, what would these requirements entail? Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The Commission anticipates that the primary costs to SDRs from proposed

calculated as follows: ((Compliance Manager at $294 per hour for 180 hours) + (Attorney at $316 per hour for 120 hours)) × 10 registrants = $908,400.

[285] *See supra* Section V.D.2.

[286] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and a Senior Systems Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour and the cost of a Senior Systems Analyst is $251 per hour. Thus, the total ongoing estimated dollar cost would be $36,896.50 per SDR and $368,965 for all SDRs, calculated as follows: ((Compliance Manager at $294 per hour for 67.7 hours) + (Senior Systems Analyst at $251 per hour for 67.7 hours)) × 10 registrants = $368,965.

[287] *See supra* Section III.G.

Rule 13n–7 would relate to the cost of making and keeping current a list of officers, managers, or persons performing similar functions who are responsible for policies and procedures and developing and maintaining information technology systems to collect and store the various records created in the course of an SDR's business.

As discussed above, the Commission estimates that the average initial paperwork cost associated with making and keeping a list of responsible officer, manager, or persons performing similar functions and developing and maintaining information technology systems to ensure compliance with the proposed recordkeeping requirements would be 346 hours and $1,800 for each SDR and the average ongoing paperwork cost associated with developing policies and procedures to ensure compliance with the proposed recordkeeping requirements would be 279.17 hours per year for each SDR.[288] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $1,015,460 [289] and the aggregate ongoing estimated dollar cost per year would be $820,760 [290] to comply with the proposed rule.

The Commission does not believe that persons currently operating as SDRs will be subject to significant additional recordkeeping costs as a result of proposed Rule 13n–7 because such persons already maintain business records as part of their day-to-day operations. However, the proposed rule provides specific parameters relating to the retention and maintenance of these records and the proposed requirements may be more extensive than current market practices.

The Commission solicits comment on the costs related to proposed Rule 13n–7. The Commission specifically requests comment on the initial and ongoing costs associated with establishing and maintaining the recordkeeping systems and related policies and procedures, including whether currently-operating SDRs would incur different recordkeeping costs. Are there additional costs related to recordkeeping that the Commission should consider? Are there alternatives that the Commission should consider? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the initial and ongoing costs necessary to comply with the proposed rule to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

D. Reports and Reviews

Proposed Rule 13n–6(b)(2) would require an SDR to submit an annual review of its systems that support or integrally relate to its performance as an SDR to the Commission.[291] Proposed Rule 13n–8 would require an SDR to comply with certain reporting requirements, including promptly providing reports or information upon request by the Commission.[292]

1. Benefits

Title VII of the Dodd-Frank Act establishes a regulatory framework for the OTC derivatives market that depends on the Commission's and other regulators' access to information regarding the current and historical operation of the SBS market to verify compliance with the statute and effective monitoring for market risk and abuse. In addition, specific provisions of Title VII require routine, targeted monitoring of certain types of events. The rules discussed in this section would be issued pursuant to specific grants of rulemaking authority in the Dodd-Frank Act [293] and are designed to further the legislation's goals by (a) ensuring that each SDR's systems provide adequate levels of capacity, resiliency, and security, and (b) facilitating access by the Commission and other regulators to information necessary to achieve their legislative mandates and to establish mechanisms by which SDRs will provide routine reports to the Commission. Access to such information will enhance regulators' ability to oversee the SBS market, which is critical to the continued integrity of our markets, and detect and deter fraudulent and manipulative activity and other trading abuses in connection with the derivatives markets.

The Commission solicits comment on the benefits related to the requirements contained in proposed Rules 13n–6(b)(2) and 13n–8. Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The Commission anticipates that the primary costs to an SDR from proposed Rule 13n–6(b)(2) would relate to the cost of conducting an annual review of the SDR's systems and, if the review is performed by an internal department, the cost associated with hiring an objective, external firm to assess the internal department's objectivity, competency, and work performance. The Commission anticipates that the primary costs to SDRs from proposed Rule 13n–8 would relate to the cost of developing and maintaining systems to respond to requests for information and provide the necessary reports and establishing related policies and procedures. In addition, SDRs will need to maintain staff to respond to the requests and provide the reports required under the proposed rules.[294]

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with proposed Rule 13n–6(b)(2) would be 825 hours and $90,000.[295] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $2,845,750 to comply with the proposed rule.[296]

[288] *See supra* Section V.D.3.

[289] The Commission estimates that an SDR will assign these responsibilities primarily to a Compliance Manager as well as a Senior Systems Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour and the cost of a Senior Systems Analyst is $251 per hour. Thus, the total initial estimated dollar cost would be $101,546 per SDR and $1,015,460 for all SDRs, calculated as follows: ($1,800 in information technology costs + (Compliance Manager at $294 per hour for 300 hours) + (Senior Systems Analyst at $251 per hour for 46 hours)) × 10 registrants = $1,015,460.

[290] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour. Thus, the total ongoing estimated dollar cost would be $82,076 per SDR and $820,760 for all SDRs, calculated as follows: (Compliance Manager at $294 per hour for 279.17 hours) × 10 registrants = $820,760.

[291] *See supra* Section III.F.

[292] *See supra* Section III.H.

[293] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)).

[294] The Commission understands some currently-existing SDRs may have dedicated personnel who are responsible for responding to and providing ad hoc report requests from regulators, including the Commission. To the extent that proposed Rule 13n–8 may result in more automated reporting, the need for such dedicated personnel resources may be reduced.

[295] *See supra* Section V.D.4.

[296] The Commission estimates that an SDR will assign these responsibilities to an Attorney, a Manager Internal Audit, and a Senior Internal Auditor. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits,

Continued

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with proposed Rule 13n–8 would be 1 hour per year for each SDR.[297] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $2,340 to comply with the proposed rule.[298]

The Commission solicits comment on the costs related to proposed Rules 13n–6(b)(2) and 13n–8. The Commission specifically requests comment on the initial and ongoing costs associated with establishing and providing the reports required under the proposed rules. Are there additional costs associated with supplying the required reports that the Commission should consider? Are there alternatives that the Commission should consider? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the initial and ongoing costs necessary to comply with proposed Rules 13n–6(b)(2) and 13n–8 to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

E. Disclosure

Under proposed Rule 13n–10, before collecting any transaction data from a market participant or upon the market participant's request, each SDR would be required to furnish the market participant a disclosure document containing certain information that reasonably will enable the market participant to identify and evaluate the risks and costs associated with using the services of the SDR.[299] An SDR's disclosure document must include, among other things, the SDR's criteria for providing others with access to services offered and data maintained by the SDR; the SDR's criteria for those seeking to connect to or link with the SDR; a description of the SDR's policies and procedures regarding safeguarding of data and operational reliability, and privacy; the SDR's policies and procedures regarding its non-commercial and/or commercial use of transaction data; dispute resolution procedures; description of all services, including ancillary services; schedule of dues, unbundled prices, and discounts or rebates; and a description of the SDR's governance arrangements.

1. Benefits

Proposed Rule 13n–10 is intended to provide certain information regarding an SDR to market participants prior to entering into an agreement to provide transaction data to the SDR. Although the Commission anticipates that there may be only one SDR for any given asset class, to the extent that multiple SDRs accept data for the same asset class, the disclosure document would enable market participants to make an informed choice among SDRs. Even if only one SDR serves a given asset class, the disclosure document is necessary to inform market participants of the nature of the services provided by the SDR and the conditions and obligations that are imposed on market participants in order for the participants to submit data to the SDR.

The rule discussed in this section is designed to further the Dodd-Frank Act's goals by providing market participants with applicable information regarding the operation of SDRs. The Commission solicits comment on the benefits related to proposed Rule 13n–10. Should the Commission narrow or broaden the scope of the information to be included in the disclosure document? Should the Commission adjust the frequency with which the disclosure document is provided to market participants? Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

As discussed above, the Commission estimates that the average initial paperwork cost associated with developing the disclosure document and related policies and procedures would be 97.5 hours and $9,400 for each SDR and the average ongoing paperwork cost would be 1 hour per year for each SDR.[300] Assuming a maximum of ten registered SDRs, the aggregate one-time estimated dollar cost would be $266,087.50[301] and the aggregate ongoing estimated dollar cost per year would be $1,765[302] to comply with the proposed rule.

The Commission solicits comment on the costs related to proposed Rule 13n–10. The Commission specifically requests comment on the initial and ongoing costs associated with drafting, reviewing, printing, and providing the required disclosure document. Are there alternatives that the Commission should consider? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the initial and ongoing costs necessary to comply with proposed Rule 13n–10 to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

F. Chief Compliance Officer and Compliance Functions

Proposed Rules 13n–4(b)(11) and 13n–11 would require each registered SDR to designate on Form SDR a CCO whose duties include preparing an annual compliance report, which would be submitted to the Commission annually along with an annual financial report.[303] The CCO would be appointed

and overhead, suggest that the cost of an Attorney is $316 per hour, the cost of a Manager Internal Audit is $291 per hour, and the cost of a Senior Internal Auditor is $195 per hour. Thus, the total ongoing estimated dollar cost would be $284,575 per SDR and $2,845,750 for all SDRs, calculated as follows: ($90,000 for external audit firm + (Attorney at $316 per hour for 100 hours) + (Manager Internal Auditor at $291 per hour for 225 hours) + (Senior Systems Analyst at $251 per hour for 500 hours)) × 10 registrants = $2,845,750.

[297] *See supra* Section V.D.4.

[298] The Commission estimates that an SDR will assign these responsibilities to a Senior Business Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Senior Business Analyst is $234 per hour. Thus, the total ongoing estimated dollar cost would be $234 per SDR and $2,340 for all SDRs, calculated as follows: (Senior Business Analyst at $234 per hour for 1 hour) × 10 registrants = $2,340.

[299] *See supra* Section III.J.

[300] *See supra* Section V.D.5.

[301] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and a Compliance Clerk. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour and a Compliance Clerk is 59 per hour. Thus, the total initial estimated dollar cost would be $26,608.75 per SDR and $266,087.50 for all SDRs, calculated as follows: ($4,400 for external legal costs + $5,000 for external compliance consulting costs + (Compliance Manager at $294 per hour for 48.75 hours) + (Compliance Clerk at $59 per hour for 48.75 hours)) × 10 registrants = $266,087.50.

[302] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and a Compliance Clerk. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour and a Compliance Clerk is 59 per hour. Thus, the total ongoing estimated dollar cost would be $176.50 per SDR and $1,765 for all SDRs, calculated as follows: ((Compliance Manager at $294 per hour for 0.5 hours) + (Compliance Clerk at $59 per hour for 0.5 hours)) × 10 registrants = $1,765.

[303] *See supra* Sections III.D and III.K.

by the SDR's board and would report directly to the chief executive officer of the SDR or the board. The CCO would be responsible for reviewing the compliance of the SDR with the duties and core principles contained in Exchange Act Section 13(n) and the rules promulgated thereunder and reviewing and administering, and ensuring compliance with, the SDR's policies and procedures reasonably designed to achieve compliance with the federal securities laws. The CCO also would resolve any conflicts of interest, in consultation with the board or the SDR's chief executive officer, and establish procedures for the remediation of noncompliance issues. The CCO would be required to prepare and sign an annual compliance report and submit the report to the board for its review prior to the submission of the report to the Commission. Finally, the annual compliance report must be included with the annual financial report that must be prepared and filed with the Commission pursuant to the requirements of proposed Rule 13n–11(f). The compliance report must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual,[304] and the financial report must be provided in XBRL as required in Rules 405(a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S–T.[305]

1. Benefits

Proposed Rules 13n–4(b)(11) and 13n–11 would be issued pursuant to specific grants of rulemaking authority in the Dodd-Frank Act[306] and are designed to further the legislation's goals by enhancing the Commission's ability to oversee the marketplace for SBS, which is critical to the continued integrity of our markets. The proposed rules are designed to ensure that SDRs comply with the Federal securities laws, including Exchange Act Section 13(n) and the rules and regulations promulgated thereunder. Although persons currently operating as SDRs already may have CCOs in place, the proposed rules would make this standard practice for all registered SDRs, as mandated by the Dodd-Frank Act.

The reliability of the aggregation of market-wide transaction data depends upon data integrity and consistent structuring across all service providers. As a result of the proposed rule, the accuracy, reliability, integrity, and consistency of data and other records maintained by each SDR would be less likely to be harmed by violations of the securities laws because experience has shown that strong internal compliance programs lower the likelihood of securities laws violations and enhance the likelihood that any violations that do occur will be detected and corrected. The designation of a CCO, who will, among other things, monitor the application of the rules proposed herein and the relevant SDR policies and procedures, will help ensure that each SDR complies with the policies and procedures that it adopts. The ability of regulators and other users of transaction data to aggregate such data across SDRs will improve to the extent that compliance with applicable policies and procedures result in more accurate data reporting.

Proposed Rule 13n–11(f) would require SDRs to submit annual financial reports to the Commission. This rule would enhance Commission oversight by facilitating the Commission's monitoring of an SDR's financial and managerial resources. The financial reports also would assist the Commission in monitoring potential conflicts of interests of a financial nature arising from the operation of an SDR.

Benefits also will accrue from requiring SDRs to submit the filings required by the proposed rules using the interactive data format. This requirement would enable regulators to analyze the reported information more quickly, more accurately, and at a lower cost. In particular, the tagged data will make it easier to aggregate information collected from SDRs and compare across entities and over time, which the Commission believes is important for regulators to perform their duties under the Dodd-Frank Act.

The Commission solicits comment on the benefits related to Rules 13n–4(b)(11) and 13n–11. The Commission specifically requests comment on the benefits that would accrue from designating a CCO who would be responsible for preparing and certifying as accurate an annual compliance report and reporting annually to the board. Are there alternative reporting structures that could be established? Should the Commission consider additional provisions related to the annual compliance report? The Commission also requests comment on the benefits associated with the annual financial reports. Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The establishment of a designated CCO and compliance with the accompanying responsibilities of a CCO would impose certain costs on registered SDRs. As discussed above, the Commission estimates that the average initial paperwork cost associated with establishing procedures for the remediation of noncompliance issues identified by the CCO and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues would be 420 hours and $40,000 for each registered SDR and the average ongoing paperwork cost would be 120 hours for each registered SDR.[307] In addition, each SDR would be required to hire a CCO in order to comply with the proposed rules, at an annual cost of $703,800.[308] Assuming a maximum of ten SDRs, the aggregate initial estimated dollar cost per year would be $1,622,200[309] and the aggregate ongoing estimated dollar cost per year would be $7,387,200[310] to comply with the proposed rules.

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with preparing and submitting annual compliance reports to the SDR's board pursuant to proposed Rule 13n–11(d)

[304] *See* 17 CFR 232.301.

[305] *See* 17 CFR 232.405 (imposing content, format, submission and Web site posting requirements for an interactive data file, as defined in Rule 11 of Regulation S–T).

[306] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(6)).

[307] *See supra* Section V.D.6.

[308] Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a CCO is $391 per hour.

[309] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $162,220 per SDR and $1,622,200 for all SDRs, calculated as follows: ($40,000 for outside legal services + (Compliance Attorney at $291 per hour for 420 hours)) × 10 registrants = $1,622,200.

[310] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total ongoing estimated dollar cost would be $738,720 per SDR and $7,387,200 for all SDRs, calculated as follows: ($703,800 for a CCO + (Compliance Attorney at $291 per hour for 120 hours)) × 10 registrants = $7,387,200.

and (g) would be 5 hours.[311] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $14,550 to comply with the proposed rule.[312]

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with preparing annual financial reports pursuant to proposed Rule 13n–11(f) and (g) would be 500 hours and $500,000 for each registered SDR.[313] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $5,915,000 to comply with the proposed rules.[314]

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with submitting annual compliance and financial reports to the Commission pursuant to proposed Rule 13n–11(d), (f), and (g) would be 54 hours and $22,772 for each registered SDR.[315] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $363,260 to comply with the proposed rules.[316]

The Commission believes that currently-existing SDRs already maintain compliance programs that are overseen by a CCO or an individual who effectively serves as a CCO. In addition, such SDRs may prepare compliance reports presented to senior management and/or the SDRs' boards as part of their current business practice. Therefore, the Commission expects that SDRs with substantial commitments to compliance would incur only minimal costs in connection with the adoption of the proposed rule. However, the preparation of annual compliance and financial reports and implementation of related policies and procedures may require a staff beyond just a CCO, and therefore the proposed rules may result in additional direct costs to entities that register as SDRs.

The Commission believes that currently-existing SDRs already prepare financial reports similar to those that would be prepared in accordance with proposed Rule 13n–1(f). Therefore, the Commission expects that most SDRs would incur only minimal costs in connection with the adoption of the proposed financial reporting requirement.

The Commission solicits comment on the costs related to Rules 13n–4(b)(11) and 13n–11. The Commission specifically requests comment on the initial and ongoing costs associated with designating a CCO and the costs associated with any personnel that may be necessary to support the CCO and create the annual compliance and financial reports. Are there additional costs that the Commission should consider? Are there alternatives that the Commission should consider? Do the estimates accurately reflect the cost of preparing annual compliance and financial reports? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the costs necessary to comply with proposed Rules 13n–4(b)(11) and 13n–11 to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

G. Other Policies and Procedures Relating to an SDR's Business

The proposed rules explicitly and implicitly will require registered SDRs to develop and maintain various policies and procedures.[317] Proposed Rule 13n–9 will require each SDR to comply with certain duties and core principles pertaining to confidentiality, disclosure, and use of information.[318] Proposed Rule 13n–4(c) would require each SDR to comply with certain core principles pertaining to market access to services and data, governance arrangements, and conflicts of interest, including developing policies and procedures related to fees, operational reliability, and objective access and participation criteria.[319] Proposed Rule 13n–5(b)(6) would require SDRs to develop dispute resolution mechanisms.[320]

1. Benefits

The proposed rules described in this section would be issued pursuant to specific grants of rulemaking authority in the Dodd-Frank Act[321] and are designed to further the legislation's goals by specifying the obligations of registered SDRs necessary to comply with the goals of the Dodd-Frank Act. The proposed privacy requirement is intended to safeguard transaction data provided to SDRs by market participants. Privacy is necessary in order to ensure that market participants will utilize the services of registered SDRs.

The proposed rule relating to market access to services and data is designed to further the legislation's goals by ensuring that SDRs impose fair, reasonable, and consistently applied fees and maintain objective access and participation criteria. As with the privacy requirement, this rule would encourage market participants to make use of SDRs' services.

The proposed governance requirements are designed to reduce the conflicts of interest relating to SDRs. In addition, by requiring fair representation of market participants on the board with the opportunity to participate in the process for nominating directors and the right to petition for alternative candidates, the proposed rule will help reduce the likelihood that an incumbent SBS market participant could exert undue influence on the board.

While the above requirements will serve to prevent and constrain potential conflicts of interest, proposed Rule 13n–4(c)(3) directly addresses conflicts of interest through targeted policies and procedures and an obligation to establish a process for resolving conflicts of interest. This rule would

[311] *See supra* Section V.D.6.

[312] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total ongoing estimated dollar cost would be $1,455 per SDR and $14,550 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 5 hours) × 10 registrants = $14,550.

[313] *See supra* Section V.D.6.

[314] The Commission estimates that an SDR will assign these responsibilities to a Senior Accountant. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Senior Accountant is $183 per hour. Thus, the total ongoing estimated dollar cost would be $591,500 per SDR and $5,915,000 for all SDRs, calculated as follows: ($500,000 for independent public accounting services (Senior Accountant at $183 per hour for 500 hours)) × 10 registrants = $5,915,000.

[315] *See supra* Section V.D.6.

[316] The Commission estimates that an SDR will assign these responsibilities to a Senior Systems Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Senior Systems Analyst is $251 per hour. Thus, the total ongoing estimated dollar cost would be $36,236 per SDR and $363,260 for all SDRs, calculated as follows: ($22,772 for information technology services (Senior Systems Analyst at $251 per hour for 54 hours)) × 10 registrants = $363,260.

[317] *See supra* Section VI.B for a discussion of the cost and benefits associated with the policies and procedures SDRs must develop and maintain with respect to their information systems.

[318] *See supra* Section III.I.

[319] *See supra* Section III.D.

[320] *See supra* Section III.E.

[321] *See* Public Law 111–203, § 763(i) (adding Exchange Act Sections 13(n)(5)(F)–(H) and (7)(A)–(C)).

help mitigate the possibility that SDRs' business practices and internal structures might disadvantage market participants and provide a mechanism through which conflicts may be resolved once identified.

The proposed dispute resolution requirements also serve the legislative purpose of maintaining accurate records relating to SDRs. In addition to ensuring the accuracy of data contained in SDRs, the dispute resolution requirement would provide a forum in which market participants could correct inaccuracies in transaction data regarding transactions to which they are parties, thereby fostering increased confidence from market participants in SDRs and the transaction records such SDRs maintain.

Collectively, the rules described in this section would help ensure that SDRs operate consistently with the objectives set forth in the Exchange Act by providing fair, open, and not unreasonably discriminatory access to all market participants without taking advantage of the SDRs' access to transaction data that market participants are required to submit to the SDRs.

The Commission solicits comment on the benefits related to Rules 13n–4(c), 13n–5(b)(6), and 13n–9. Would additional benefits accrue if the Commission imposed further requirements related to the policies and procedures that SDRs must maintain and, if so, what would these additional requirements be? Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The Commission anticipates that the primary costs to SDRs from proposed Rules 13n–4(c), 13n–5(b)(6), and 13n–9 will derive from developing, maintaining, and ensuring compliance with the required policies and procedures.

The governance requirements could impose costs resulting from educating senior management and each director about SBS trading and reporting and the new regulatory structure that will govern SBS, which could slow management or board processes at least initially.

The dispute resolution requirement also would impose costs on registered SDRs because SDRs would be required to develop and implement processes through which market participants could challenge the validity of the transaction data relating to agreements to which such participant is a counterparty.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–4(c)(1) would be 367.5 hours and $35,000 and the average ongoing cost would be 105 hours per year for each SDR.[322] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $1,374,800[323] and the aggregate ongoing estimated dollar cost per year would be $294,070[324] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–4(c)(2) would be 210 hours and $20,000 for each SDR and the average ongoing paperwork cost would be 60 hours per year for each SDR.[325] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $811,100[326] and the aggregate ongoing estimated dollar cost per year would be $174,600[327] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–4(c)(3) would be 420 hours and $40,000 for each SDR and the average ongoing paperwork cost would be 120 hours per year for each SDR.[328] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $1,622,200[329] and the aggregate ongoing estimated dollar cost per year would be $349,200[330] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–5(b)(6) would be 315 hours and $30,000 for each SDR and the average ongoing paperwork cost would be 90 hours per year for each SDR.[331] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $1,216,650[332] and

[322] *See supra* Section V.D.7.

[323] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour, the cost of an Attorney is $316 per hour, the cost of a Senior Systems Analyst is $251 per hour, and the cost of an Operation Specialist is $114 per hour. Thus, the total initial estimated dollar cost would be $137,480 per SDR and $1,374,800 for all SDRs, calculated as follows: ($35,000 for outside legal services + (Compliance Manager at $294 per hour for 135 hours) + (Attorney at $316 per hour for 152.5 hours) + (Senior Systems Analyst at $251 per hour for 40 hours) + (Operations Specialist at $114 per hour for 40 hours)) × 10 registrants = $1,374,800.

[324] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour, the cost of an Attorney is $316 per hour, the cost of a Senior Systems Analyst is $251 per hour, and the cost of an Operation Specialist is $114 per hour. Thus, the total ongoing estimated dollar cost would be $29,407 per SDR and $294,070 for all SDRs, calculated as follows: ((Compliance Manager at $294 per hour for 38 hours) + (Attorney at $316 per hour for 45 hours) + (Senior Systems Analyst at $251 per hour for 11 hours) + (Operations Specialist at $114 per hour for 11 hours)) × 10 registrants = $294,070.

[325] *See supra* Section V.D.7.

[326] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $81,110 per SDR and $811,100 for all SDRs, calculated as follows: ($20,000 for outside legal services + (Compliance Attorney at $291 per hour for 210 hours)) × 10 registrants = $811,100.

[327] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total ongoing estimated dollar cost would be $17,460 per SDR and $174,600 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 120 hours) × 10 registrants = $174,600.

[328] *See supra* Section V.D.7.

[329] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $162,220 per SDR and $1,622,200 for all SDRs, calculated as follows: ($40,000 for outside legal services + (Compliance Attorney at $291 per hour for 420 hours)) × 10 registrants = $1,622,200.

[330] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total ongoing estimated dollar cost would be $34,920 per SDR and $349,200 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 120 hours) × 10 registrants = $349,200.

[331] *See supra* Section V.D.7.

[332] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry*

Continued

the aggregate ongoing estimated dollar cost per year would be $261,900 [333] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–9 would be 630 hours and $60,000 for each SDR and the average ongoing paperwork cost would be 180 hours per year for each SDR.[334] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $2,433,300 [335] and the aggregate ongoing estimated dollar cost per year would be $523,800 [336] to comply with the proposed rule.

The Commission solicits comment on the costs related to proposed Rules 13n–4(c), 13n–5(b)(6), and 13n–9. The Commission specifically requests comment on the initial and ongoing costs associated with establishing and maintaining the policies and procedures required by the proposed rules, particularly as the costs apply to entities currently operating as SDRs. Are there additional costs implicated by the proposed rules related to policies and procedures that the Commission should consider? Are there alternatives that the Commission should consider? Do the estimates accurately reflect the cost of maintaining, implementing, and revising the required policies and procedures? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the initial and ongoing costs necessary to comply with the rules relating to policies and procedures to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

H. Total Costs

Based on the analyses described above, the Commission preliminarily estimates that proposed Rules 13n–1 through 13n–11 and proposed Form SDR would impose on registered SDRs an aggregate total initial one-time estimated dollar cost of approximately $214,913,592.[337] The Commission further preliminarily estimates that proposed Rules 13n–1 through 13n–11 and proposed Form SDR would impose on registered SDRs a total ongoing annualized aggregate dollar cost of approximately $140,302,120.[338] Altogether, the Commission preliminarily estimates that proposed Rules 13n–1 through 13n–11, proposed Form SDR, and proposed Regulation SBSR [339] would impose on registered SDRs aggregate initial estimated dollar costs of approximately $295,891,852 [340] and aggregate ongoing annualized dollar costs of approximately $245,428,520.[341]

I. Request for Comment

The Commission requests data to quantify the costs and the value of the benefits above. The Commission seeks estimates of these costs and benefits, as well as any costs and benefits not already defined, which may result from the adoption of the proposed rules and Form SDR. Commenters should provide analysis and empirical data to support their views on the costs and benefits associated with the proposals.

VII. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Exchange Act Section 23(a) [342] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Securities Act Section 2(b) [343] and Exchange Act Section 3(f) [344] require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. Below, the Commission addresses these issues for the proposed rules regarding data collection and maintenance and recordkeeping by SDRs and books and records relating to SBS. The Commission focuses on the effects of the discretion used by the Commission rather than the mandates of the Dodd-Frank Act. However, to the extent that the discretion is used to take full advantage of the benefits intended by the Dodd-Frank Act, the two types of benefits are not entirely separable.

The economic effects of the proposed rules were discussed in detail in the

2009, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $121,665 per SDR and $1,216,650 for all SDRs, calculated as follows: ($30,000 for outside legal services + (Compliance Attorney at $291 per hour for 315 hours)) × 10 registrants = $1,216,650.

[333] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $26,190 per SDR and $261,900 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 90 hours) × 10 registrants = $261,900.

[334] *See supra* Section V.D.7.

[335] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $243,330 per SDR and $2,433,300 for all SDRs, calculated as follows: ($60,000 for outside legal services + (Compliance Attorney at $291 per hour for 630 hours)) × 10 registrants = $2,433,300.

[336] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total ongoing estimated dollar cost would be $52,380 per SDR and $523,800 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 180 hours) × 10 registrants = $523,800.

[337] The Commission derived its estimate from the following: ($589,544 ($584,000 + $5,544) for Registration Requirements and Form SDR) + ($203,962,250 ($200,020,000 + $16,000 + $3,926,250) for SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access) + ($1,015,460 for Recordkeeping) + ($266,088 for Disclosure) + ($1,622,200 for Chief Compliance Officer and Compliance Functions) + ($7,458,050 ($1,374,800 + $811,100 + $1,622,200 + $1,216,650 + $2,433,300) for Other Policies and Procedures Relating to an SDR's Business) = $214,913,592.

[338] The Commission derived its estimate from the following: ($49,080 for Registration Requirements and Form SDR) + ($121,298,845 ($120,012,000 + $9,480 + $908,400 + $368,965) for SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access) + ($820,760 for Recordkeeping) + ($2,848,090 ($2,845,750 + $2,340) for Reports and Reviews) + ($1,765 for Disclosure) + ($13,680,010 ($7,387,200 + $14,550 + $5,915,000 + $363,260) for Chief Compliance Officer and Compliance Functions) + ($1,603,570 ($294,070 + $174,600 + $349,200 + $261,900 + $523,800) for Other Policies and Procedures Relating to an SDR's Business) = $140,302,120.

[339] *See* Regulation SBSR Release, *supra* note 9.

[340] The Commission derived its estimate from the following: ($214,913,592 for proposed Rules 13n–1 through 13n–11 and proposed Form SDR) + ($80,978,260 for proposed Regulation SBSR) = $295,891,852.

[341] The Commission derived its estimate from the following: ($140,302,120 for proposed Rules 13n–1 through 13n–11 and proposed Form SDR) + ($105,126,400 for proposed Regulation SBSR) = $245,428,520.

[342] 15 U.S.C. 78w(a).

[343] 15 U.S.C. 77b(b).

[344] 15 U.S.C. 78c(f).

costs and benefits section. These economic benefits encompassed effects on economic efficiency, competition, and capital formation.

To reiterate, by allowing multiple SDRs to provide data collection, maintenance, and recordkeeping services, the rules are intended to promote competition among SDRs. We do not preliminarily believe that the provisions would give undue market influence to any potential market participants. We believe that non-resident SDRs generally can take steps to comply with their home country requirements and the Commission's supervisory requirements, and therefore can register with the Commission. We recognize that there potentially could be instances in which a non-resident SDR is unable to register because, for example, they cannot make the certification or provide the opinion of counsel required by proposed Rule 13n–1(g). We believe, however, that these requirements are necessary and appropriate in furtherance of the purpose of the Exchange Act.

However, by allowing multiple SDRs, the proposed rules may result in inefficiencies as explained in the benefits and costs section of this release. In particular, the potential reporting of transaction data to multiple SDRs would create a need to aggregate those data by regulators and other interested parties. From a systemic risk perspective, monitoring costs increase if identifiers or data field definitions used by different SDRs are not compatible with each other and aggregation is difficult. The complications associated with aggregation could be particularly costly when aggregation is required across the same asset class and different legs of the same transaction reside in different SDRs. However, the current market structure essentially consists of only one SDR per asset class, and it is likely that the market would, under competitive forces, ultimately converge to an efficient outcome that does not present compatibility problems or that entails fewer, rather than many, SDRs.

The Commission believes that the proposed rules use the discretion that the Dodd-Frank Act permits the Commission to use to promote data collection, maintenance, and recordkeeping according to existing best practices that are used in similar capital market institutions. This is likely to positively affect transparency in credit markets. Therefore, the proposed rules would help capital formation in the broader capital markets whose participants rely on SBS markets to meet their hedging objectives.

The practices that are proposed in the rules would also help regulators perform their supervisory functions in an effective manner. The resulting increase in market integrity is likely to affect capital formation in our capital markets positively. In addition, regulators would be better equipped to perform their duties in the management and mitigation of systemic risk.

VIII. Initial Regulatory Flexibility Act Certification

Section 603(a) of the Regulatory Flexibility Act [345] ("RFA") requires the Commission to undertake an initial regulatory flexibility analysis of the impact of proposed Rules 13n–1 through 13n–11 on small entities, unless the Commission certifies that the proposed rules, if adopted, would not have significant economic impact on a substantial number of small entities.[346]

A. SDRs

Proposed Rules 13n–1 through 13n–11 would apply to all SDRs. In the Dodd-Frank Act, Congress defined for the first time what activity would constitute an SDR and mandated the registration of these new entities. The Commission does not know exactly how many entities may seek to register as SDRs and become subject to the requirements of the proposed rules. However, based on its understanding of the market and conversations with industry sources, the Commission preliminarily believes that likely no more than ten SDRs could be subject to the requirements of proposed Rules 13n–1 through 13n–11.

For purposes of Commission rulemaking in connection with the RFA, an issuer or person, other than an investment company, is a small business if its total assets on the last day of its most recent fiscal year were $5 million or less.[347] The Commission preliminarily believes that the entities likely to register as SDRs will not be considered small entities. The Commission preliminarily believes that most, if not all, of the SDRs will be part of large business entities, and that all SDRs will have assets in excess of $5 million and total capital in excess of $500,000.[348] Therefore, the Commission preliminarily believes that none of the SDRs will be considered small entities.

B. Certification

In the Commission's preliminary view, the proposed rules would not have a significant economic impact on a substantial number of small entities, including national securities exchanges, clearing agencies, or other small businesses or small organizations. For the above reasons, the Commission certifies that the proposed rules would not have a significant economic impact on a substantial number of small entities. The Commission requests comment regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities, including national securities exchanges, clearing agencies, or other small businesses or small organizations that may register as SDRs, and provide empirical data to support the extent of the impact.

IX. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA," [349] the Commission must advise the OMB as to whether the proposed regulations constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in: (1) An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation.

The Commission requests comment on the potential impact of the proposed rules on the economy on an annual basis, on the costs or prices for consumers or individual industries, and on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

X. Statutory Authority

Pursuant to the Exchange Act, and particularly Sections 13(n) and 23(a) thereof, 15 U.S.C. 78m(n) and 78w(a), the Commission proposes new Rules 13n–1 to 13n–11, which would govern SDRs.

List of Subjects in 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of

[345] 5 U.S.C. 603(a).

[346] 5 U.S.C. 605(b).

[347] 17 CFR 230.157. *See also* 17 CFR 240.0–10(a).

[348] Commission staff based this determination on its review of public sources of financial information about the current repositories that are providing services in the OTC derivatives market.

[349] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

2. Sections 240.13n–1 through 240–13n–11 are added to read as follows:

Sec.
240.13n–1 Registration of security-based swap data repository.
240.13n–2 Withdrawal from registration.
240.13n–3 Registration of successor to registered security-based swap data repository.
240.13n–4 Duties and core principles of security-based swap data repository.
240.13n–5 Data collection and maintenance.
240.13n–6 Automated systems.
240.13n–7 Recordkeeping of security-based swap data repository.
240.13n–8 Reports to be provided to the Commission.
240.13n–9 Privacy requirements of security-based swap data repository.
240.13n–10 Disclosure requirements of security-based swap data repository.
240.13n–11 Designation of chief compliance officer of security-based swap data repository.

§ 240.13n–1 Registration of security-based swap data repository.

(a) *Definition.* For purposes of this section—

(1) *EDGAR Filer Manual* has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232).

(2) *Non-resident security-based swap data repository* means:

(i) In the case of an individual, one who resides in or has his principal place of business in any place not in the United States;

(ii) In the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or

(iii) In the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.

(3) *Tag* (including the term *tagged*) means an identifier that highlights specific information submitted to the Commission that is in the format required by the EDGAR Filer Manual, as described in Rule 301 of Regulation S–T (17 CFR 232.301).

(b) An application for the registration of a security-based swap data repository shall be filed electronically in a tagged data format on Form SDR (17 CFR 249.1500) with the Commission in accordance with the instructions contained therein. As part of the application process, each SDR shall provide additional information to the Commission upon request.

(c) Within 90 days of the date of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall—

(1) By order grant registration, or

(2) Institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing on the record and shall be concluded not later than 180 days after the date on which the application for registration is filed with the Commission under paragraph (b) of this section. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to 90 days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

(3) The Commission shall grant the registration of a security-based swap data repository if the Commission finds that such security-based swap data repository is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as a security-based swap data repository, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder. The Commission shall deny the registration of a security-based swap data repository if it does not make any such finding.

(d) For any application of registration as a security-based swap data repository, the Commission, upon the request of a security-based swap data repository, may grant temporary registration of the security-based swap data repository that shall expire on the earlier of:

(1) The date that the Commission grants or denies registration of the security-based swap data repository; or

(2) The date that the Commission rescinds the temporary registration of the security-based swap data repository.

(e) If any information reported in items 1 through 16, 25, and 44 of Form SDR (17 CFR 249.1500) or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, the security-based swap data repository shall promptly file an amendment on Form SDR updating such information. In addition, the security-based swap data repository shall annually file an amendment on Form SDR within 60 days after the end of each fiscal year of such security-based swap data repository.

(f) Each security-based swap data repository shall designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, who shall accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the security-based swap data repository to enforce the Federal securities laws and the rules and regulations thereunder.

(g) Any non-resident security-based swap data repository applying for registration pursuant to this section shall certify on Form SDR and provide an opinion of counsel that the security-based swap data repository can, as a matter of law, provide the Commission with prompt access to the books and records of such security-based swap data repository and that the security-based swap data repository can, as a matter of law, submit to onsite inspection and examination by the Commission.

(h) An application for registration or any amendment thereto that is filed pursuant to this section shall be considered a "report" filed with the Commission for purposes of Sections 18(a) and 32(a) of the Act (15 U.S.C. 78r(a) and 78ff(a)) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.

§ 240.13n–2 Withdrawal from registration.

(a) *Definitions.* For purposes of this section—

(1) *Control* (including the terms *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:

(i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions);

(ii) Directly or indirectly has the right to vote 25 percent of more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(iii) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(2) *Person associated with a security-based swap data repository* means:

(i) Any partner, officer, or director of such security-based swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under common control with such security-based swap data repository; or

(iii) Any employee of such security-based swap data repository.

(b) A registered security-based swap data repository may withdraw from registration by filing a notice of withdrawal with the Commission. The security-based swap data repository shall designate on its notice of withdrawal a person associated with the security-based swap data repository to serve as the custodian of the security-based swap data repository's books and records. Prior to filing a notice of withdrawal, a security-based swap data repository shall file an amended Form SDR (17 CFR 249.1500) to update any inaccurate information.

(c) A notice of withdrawal from registration filed by a security-based swap data repository shall become effective for all matters (except as provided in this paragraph (c)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such security-based swap data repository consents or which the Commission, by order, may determine as necessary or appropriate in the public interest or for the protection of investors, or within such shorter period of time as the Commission may determine.

(d) A notice of withdrawal that is filed pursuant to this section shall be considered a "report" filed with the Commission for purposes of Sections 18(a) and 32(a) of the Act (15 U.S.C. 78r(a) and 78ff(a)) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.

(e) If the Commission finds, on the record after notice and opportunity for hearing, that any registered security-based swap data repository has obtained its registration by making any false and misleading statements with respect to any material fact or has violated or failed to comply with any provision of the federal securities laws and the rules and regulations thereunder, the Commission, by order, may revoke the registration. Pending final determination of whether any registration shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing on the record, to be necessary or appropriate in the public interest or for the protection of investors.

(f) If the Commission finds that a registered security-based swap data repository is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, may cancel the registration.

§ 240.13n–3 Registration of successor to registered security-based swap data repository.

(a) In the event that a security-based swap data repository succeeds to and continues the business of a security-based swap data repository registered pursuant to Section 13(n) of the Act (15 U.S.C. 78m(n)), the registration of the predecessor shall be deemed to remain effective as the registration of the successor if, within 30 days after such succession, the successor files an application for registration on Form SDR (17 CFR 249.1500), and the predecessor files a notice of withdrawal from registration with the Commission; *provided, however,* that the registration of the predecessor security-based swap data repository shall cease to be effective 90 days after the application for registration on Form SDR is filed by the successor security-based swap data repository.

(b) Notwithstanding paragraph (a) of this section, if a security-based swap data repository succeeds to and continues the business of a registered predecessor security-based swap data repository, and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor security-based swap data repository on Form SDR to reflect these changes. This amendment shall be deemed an application for registration filed by the predecessor and adopted by the successor.

§ 240.13n–4 Duties and core principles of security-based swap data repository.

(a) *Definitions.* For purposes of this section—

(1) *Affiliate* of a security-based swap data repository means a person that, directly or indirectly, controls, is controlled by, or is under common control with the security-based swap data repository.

(2) *Board* means the board of directors of the security-based swap data repository or a body performing a function similar to the board of directors of the security-based swap data repository.

(3) *Control* (including the terms *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:

(i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions);

(ii) Directly or indirectly has the right to vote 25 percent of more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(iii) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(4) *Director* means any member of the board.

(5) *Direct electronic access* means access, which shall be in a form and manner acceptable to the Commission, to data stored by a security-based swap data repository in an electronic format and updated at the same time as the security-based swap data repository's data is updated so as to provide the Commission or any of its designees with the ability to query or analyze the data in the same manner that the security-based swap data repository can query or analyze the data.

(6) *End-user* means any counterparty to a security-based swap that is described in Section 3C(g)(1) of the Act (15 U.S.C. 78c–3(g)(1)) and the rules and regulations thereunder.

(7) *Market participant* means any person participating in the security-based swap market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(8) *Nonaffiliated third party* of a security-based swap data repository means any person except:

(i) The security-based swap data repository,

(ii) Any affiliate of the security-based swap data repository, or

(iii) A person employed by a security-based swap data repository and any entity that is not the security-based swap data repository's affiliate (and "nonaffiliated third party" includes such entity that jointly employs the person).

(9) *Person associated with a security-based swap data repository* means:

(i) Any partner, officer, or director of such security-based swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under common control with such security-based swap data repository; or

(iii) Any employee of such security-based swap data repository.

(b) *Duties.* To be registered, and maintain registration, as a security-based swap data repository, a security-based swap data repository shall:

(1) Subject itself to inspection and examination by the Commission;

(2) Accept data as prescribed in Regulation SBSR for each security-based swap;

(3) Confirm, as prescribed in Rule 13n–5, with both counterparties to the security-based swap the accuracy of the data that was submitted;

(4) Maintain, as prescribed in Rule 13n–5, the data described in Regulation SBSR in such form, in such manner, and for such period as provided therein and in the Act and the rules and regulations thereunder;

(5) Provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity);

(6) Provide the information described in Regulation SBSR in such form and at such frequency as prescribed in Regulation SBSR to comply with the public reporting requirements set forth in Section 13(m) of the Act (15 U.S.C. 78m(m)) and the rules and regulations thereunder;

(7) At such time and in such manner as may be directed by the Commission, establish automated systems for monitoring, screening, and analyzing security-based swap data;

(8) Maintain the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity as prescribed in Rule 13n–9;

(9) On a confidential basis, pursuant to Section 24 of the Act (15 U.S.C. 78x) and the rules and regulations thereunder, upon request, and after notifying the Commission of the request, make available all data obtained by the security-based swap data repository, including individual counterparty trade and position data, to the following:

(i) Each appropriate prudential regulator, as defined in Section 3(a)(74) of the Act (15 U.S.C. 78c(a)(74));

(ii) The Financial Stability Oversight Council;

(iii) The Commodity Futures Trading Commission;

(iv) The Department of Justice; and

(v) The Federal Deposit Insurance Corporation and any other person that the Commission determines to be appropriate, including, but not limited to—

(A) Foreign financial supervisors (including foreign futures authorities);

(B) Foreign central banks; and

(C) Foreign ministries;

(10) Before sharing information with any entity described in paragraph (b)(9) of this section, obtain a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in Section 24 of the Act (15 U.S.C. 78x) and the rules and regulations thereunder relating to the information on security-based swap transactions that is provided, and each entity shall agree to indemnify the security-based swap data repository and the Commission for any expenses arising from litigation relating to the information provided under Section 24 of the Act (15 U.S.C. 78x) and the rules and regulations thereunder; and

(11) Designate an individual to serve as a chief compliance officer who shall comply with Rule 13n–11.

(c) *Compliance with core principles.* A security-based swap data repository shall comply with the core principles as described in this paragraph.

(1) *Market Access to Services and Data.* Unless necessary or appropriate to achieve the purposes of the Act and the rules and regulations thereunder, the security-based swap data repository shall not adopt any policies and procedures or take any action that results in an unreasonable restraint of trade or impose any material anticompetitive burden on the trading, clearing, or reporting of transactions. To comply with this core principle, each security-based swap data repository shall:

(i) Ensure that any dues, fees, or other charges imposed by, and any discounts or rebates offered by, a security-based swap data repository are fair and reasonable and not unreasonably discriminatory. Such dues, fees, other charges, discounts, or rebates shall be applied consistently across all similarly-situated users of such security-based swap data repository's services, including, but not limited to, market participants, market infrastructures (including central counterparties), venues from which data can be submitted to the security-based swap data repository (including exchanges, security-based swap execution facilities, electronic trading venues, and matching and confirmation platforms), and third party service providers;

(ii) Permit market participants to access specific services offered by the security-based swap data repository separately;

(iii) Establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the security-based swap data repository as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the security-based swap data repository, and third party service providers that seek to connect to or link with the security-based swap data repository; and

(iv) Establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the security-based swap data repository and to grant such person access to such services or data if such person has been discriminated against unfairly.

(2) *Governance arrangements.* Each security-based swap data repository shall establish governance arrangements that are transparent to fulfill public interest requirements under the Act and the rules and regulations thereunder; to carry out functions consistent with the Act, the rules and regulations thereunder, and the purposes of the Act; and to support the objectives of the Federal Government, owners, and participants. To comply with this core principle, each security-based swap data repository shall:

(i) Establish governance arrangements that are well defined and include a clear organizational structure with effective internal controls;

(ii) Establish governance arrangements that provide for fair representation of market participants;

(iii) Provide representatives of market participants, including end-users, with the opportunity to participate in the process for nominating directors and

with the right to petition for alternative candidates; and

(iv) Establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the security-based swap data repository's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the security-based swap data repository, to have a clear understanding of their responsibilities, and to exercise sound judgment about the security-based swap data repository's affairs.

(3) *Conflicts of interest.* Each security-based swap data repository shall establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest in the decision-making process of the security-based swap data repository and establish a process for resolving any such conflicts of interest. Such conflicts of interest include, but are not limited to: conflicts between the commercial interests of a security-based swap data repository and its statutory responsibilities; conflicts in connection with the commercial interests of certain market participants or linked market infrastructures, third party service providers, and others; conflicts between, among, or with persons associated with the security-based swap data repository, market participants, affiliates of the security-based swap data repository, and nonaffiliated third parties; and misuse of confidential information, material, nonpublic information, and/or intellectual property. To comply with this core principle, each security-based swap data repository shall:

(i) Establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the security-based swap data repository's decision-making process on an ongoing basis;

(ii) With respect to the decision-making process for resolving any conflicts of interest, require the recusal of any person involved in such conflict from such decision-making; and

(iii) Establish, maintain, and enforce reasonable written policies and procedures regarding the security-based swap data repository's non-commercial and/or commercial use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any other person.

Note to § 240.13n–4: This rule is not intended to limit, or restrict, the applicability of other provisions of the Federal securities laws, including, but not limited to, Section 13(m) of the Act (15 U.S.C. 78m(m)) and the rules and regulations thereunder.

§ 240.13n–5 Data collection and maintenance.

(a) *Definitions.* For purposes of this section—

(1) *Transaction data* means all information reported to a security-based swap data repository pursuant to the Act and the rules and regulations thereunder.

(2) *Position* means the gross and net notional amounts of open security-based swap transactions aggregated by one or more attributes, including, but not limited to, the:

(i) Underlying instrument, index, or reference entity;

(ii) Counterparty;

(iii) Asset class;

(iv) Long risk of the underlying instrument, index, or reference entity; and

(v) Short risk of the underlying instrument, index, or reference entity.

(3) *Asset class* means those security-based swaps in a particular broad category, including, but not limited to, credit derivatives, equity derivatives, and loan-based derivatives.

(b) *Requirements.* Every security-based swap data repository registered with the Commission shall comply with the following data collection and data maintenance standards:

(1) *Transaction data.*

(i) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of transaction data to the security-based swap data repository and shall accept all transaction data that is reported in accordance with such policies and procedures.

(ii) If a security-based swap data repository accepts any security-based swap in a particular asset class, the security-based swap data repository shall accept all security-based swaps in that asset class that are reported to it in accordance with its policies and procedures required by paragraph (b)(1) of this section.

(iii) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself by reasonable means that the transaction data that has been submitted to the security-based swap data repository is accurate, including clearly identifying the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of the transaction data.

(iv) Every security-based swap data repository shall promptly record the transaction data it receives.

(2) *Positions.* Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open security-based swaps for which the security-based swap data repository maintains records.

(3) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are accurate.

(4) Every security-based swap data repository shall maintain transaction data for not less than five years after the applicable security-based swap expires and historical positions for not less than five years:

(i) In a place and format that is readily accessible to the Commission and other persons with authority to access or view such information; and

(ii) In an electronic format that is non-rewriteable and non-erasable.

(5) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid security-based swap from being invalidated or modified through the procedures or operations of the security-based swap data repository.

(6) Every security-based swap data repository shall establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the security-based swap data repository.

(7) If a security-based swap data repository ceases doing business, or ceases to be registered pursuant to Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder, it must continue to preserve, maintain and make accessible the transaction data and historical positions required to be collected, maintained and preserved by this section in the manner required by the Act and the rules and regulations thereunder and for the remainder of the period required by this section.

(8) Every security-based swap data repository shall make and keep current a plan to ensure that the transaction data and positions that are recorded in the security-based swap data repository continue to be maintained in accordance with Rule 13n–5(b)(7), which shall include procedures for transferring the transaction data and positions to the Commission or its

designee (including another registered security-based swap data repository).

§ 240.13n–6 Automated systems.

(a) *Definitions.* For purposes of this section—

(1) *Material system outage* means an unauthorized intrusion into any system, or an event at a security-based swap data repository that causes a problem in its systems or procedures that results in:

(i) A failure to maintain service level agreements or constraints;

(ii) A disruption of normal operations, including switchover to back-up equipment with no possibility of near-term recovery of primary hardware;

(iii) A loss of use of any system;

(iv) A loss of transactions;

(v) Excessive back-ups or delays in processing;

(vi) A loss of ability to disseminate transaction data and positions;

(vii) A communication of an outage situation to other external entities;

(viii) A report or referral of an event to the security-based swap data repository's board of directors, a body performing a function similar to the board of the directors, or senior management;

(ix) A serious threat to its systems operations even though its systems operations were not disrupted;

(x) A queuing of data between system components or queuing of messages to or from customers of such duration that a customer's normal service delivery is affected; or

(xi) A failure to maintain the integrity of its systems that results in the entry of erroneous or inaccurate transaction data or other information in the security-based swap data repository or the securities markets.

(2) *Material systems change* means a change to automated systems of a security-based swap data repository that:

(i) Significantly affects its existing capacity or security;

(ii) In itself, raises significant capacity or security issues, even if it does not affect other existing systems;

(iii) Relies upon substantially new or different technology;

(iv) Is designed to provide a new service or function; or

(v) Otherwise significantly affects the operations of the security-based swap data repository.

(3) *Objective review* means an internal or external review, performed by competent, objective personnel following established procedures and standards, and containing a risk assessment conducted pursuant to a review schedule.

(4) *Competent, objective personnel* means a recognized information technology firm or a qualified internal department knowledgeable of information technology systems.

(5) *Review schedule* means a schedule in which each element contained in paragraph (b)(1) of this section would be assessed at specific, regular intervals.

(6) *Transaction data* has the same meaning as in Rule 13n–5(a)(1).

(7) *Position* has the same meaning as in Rule 13n–5(a)(2).

(b) *Requirements for security-based swap data repositories.* Every security-based swap data repository, with respect to those systems that support or are integrally related to the performance of its activities, shall:

(1) Establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, resiliency, and security. These policies and procedures shall, at a minimum:

(i) Establish reasonable current and future capacity estimates;

(ii) Conduct periodic capacity stress tests of critical systems to determine such systems' ability to process transactions in an accurate, timely, and efficient manner;

(iii) Develop and implement reasonable procedures to review and keep current its system development and testing methodology;

(iv) Review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters; and

(v) Establish adequate contingency and disaster recovery plans.

(2) On an annual basis, submit an objective review to the Commission within thirty calendar days of its completion. Where the objective review is performed by an internal department, an objective, external firm shall assess the internal department's objectivity, competency, and work performance with respect to the review performed by the internal department. The external firm must issue a report of the objective review, which the security-based swap data repository must submit to the Commission on an annual basis, within 30 calendar days of completion of the review;

(3) Promptly notify the Commission of material systems outages and any remedial measures that have been implemented or are contemplated. Prompt notification includes the following:

(i) Immediately notify the Commission when a material systems outage is detected;

(ii) Immediately notify the Commission when remedial measures are selected to address the material systems outage;

(iii) Immediately notify the Commission when the material systems outage is addressed; and

(iv) Submit to the Commission within five business days of the occurrence of the material systems outage a detailed written description and analysis of the outage and any remedial measures that have been implemented or are contemplated; and

(4) Notify the Commission in writing at least thirty calendar days before implementation of any planned material systems changes.

(c) *Electronic filing.* Every security-based swap data repository shall submit every notification, review, or description and analysis that is required to be submitted to the Commission pursuant to this section (other than the notifications pursuant to paragraph (b)(3)(i), (ii), or (iii) of this section) in an appropriate electronic format. Every such notification, review, or description and analysis shall be submitted to the Division of Trading and Markets, Office of Market Operations, at the principal office of the Commission in Washington, DC. Every such notification, review, or description and analysis shall be considered submitted when an electronic version is received at the Division of Trading and Markets, Office of Market Operations, at the principal office of the Commission in Washington, DC.

(d) *Confidential treatment.* A person who submits a notification, review, or description and analysis pursuant to this section for which he or she seeks confidential treatment shall clearly mark each page or segregable portion of each page with the words "Confidential Treatment Requested." A notification, review, or description and analysis submitted pursuant to this section will be accorded confidential treatment to the extent permitted by law.

§ 240.13n–7 Recordkeeping of security-based swap data repository.

(a) Every security-based swap data repository shall make and keep current the following books and records relating to its business:

(1) A record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the security-based swap data repository maintains at that office and the information contained in those records; and

(2) A record listing each officer, manager, or person performing similar functions of the security-based swap data repository responsible for establishing policies and procedures

that are reasonably designed to ensure compliance with the Act and the rules and regulations thereunder.

(b) *Recordkeeping rule for security-based swap data repositories.*

(1) Every security-based swap data repository shall keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the Act and the rules and regulations thereunder, correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such.

(2) Every security-based swap data repository shall keep all such documents for a period of not less than five years, the first two years in a place that is immediately available to the staff of the Commission for inspection and examination.

(3) Every security-based swap data repository shall, upon request of any representative of the Commission, promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it pursuant to paragraphs (a) and (b) of this section.

(c) If a security-based swap data repository ceases doing business, or ceases to be registered pursuant to Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder, it must continue to preserve, maintain, and make accessible the records/data required to be collected, maintained and preserved by this section in the manner required by this section and for the remainder of the period required by this section.

(d) This section does not apply to data collected and maintained pursuant to Rule 13n–5.

§ 240.13n–8 Reports to be provided to the Commission.

Every security-based swap data repository shall promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Act and the rules and regulations thereunder.

§ 240.13n–9 Privacy requirements of security-based swap data repository.

(a) *Definitions.* For purposes of this section—

(1) *Affiliate* of a security-based swap data repository means a person that, directly or indirectly, controls, is controlled by, or is under common control with the security-based swap data repository.

(2) *Control* (including the terms *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:

(i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions);

(ii) Directly or indirectly has the right to vote 25 percent of more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(iii) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(3) *Market participant* means any person participating in the security-based swap market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(4) *Nonaffiliated third party* of a security-based swap data repository means any person except:

(i) The security-based swap data repository,

(ii) The security-based swap data repository's affiliate, or

(iii) A person employed by a security-based swap data repository and any entity that is not the security-based swap data repository's affiliate (and *nonaffiliated third party* includes such entity that jointly employs the person).

(5) *Nonpublic personal information* means:

(i) Personally identifiable information and

(ii) Any list, description, or other grouping of market participants (and publicly available information pertaining to them) that is derived using personally identifiable information that is not publicly available information.

(6) *Personally identifiable information* means any information:

(i) A market participant provides to a security-based swap data repository to obtain service from the security-based swap data repository,

(ii) About a market participant resulting from any transaction involving a service between the security-based swap data repository and the market participant, or

(iii) The security-based swap data repository obtains about a market participant in connection with providing a service to that market participant.

(7) *Person associated with a security-based swap data repository* means:

(i) Any partner, officer, or director of such security-based swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under common control with such security-based swap data repository; or

(iii) Any employee of such security-based swap data repository.

(b) Each security-based swap data repository shall:

(1) Establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity. Such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository shares with affiliates and nonaffiliated third parties; and

(2) Establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of:

(i) Any confidential information received by the security-based swap data repository, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers;

(ii) Material, nonpublic information; and/or

(iii) Intellectual property, such as trading strategies or portfolio positions, by the security-based swap data repository or any person associated with the security-based swap data repository for their personal benefit or the benefit of others. Such safeguards, policies, and procedures shall address, without limitation,

(A) Limiting access to such confidential information, material, nonpublic information, and intellectual property,

(B) Standards pertaining to the trading by persons associated with the security-based swap data repository for their personal benefit or the benefit of others, and

(C) Adequate oversight to ensure compliance with this subparagraph.

§ 240.13n–10 Disclosure requirements of security-based swap data repository.

(a) *Definition.* For purposes of this section—

(1) *Market participant* means any person participating in the over-the-counter derivatives market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(b) Before accepting any security-based swap data from a market participant or upon a market participant's request, a security-based swap data repository shall furnish to the market participant a disclosure document that contains the following written information, which must reasonably enable the market participant to identify and evaluate accurately the risks and costs associated with using the services of the security-based swap data repository:

(1) The security-based swap data repository's criteria for providing others with access to services offered and data maintained by the security-based swap data repository;

(2) The security-based swap data repository's criteria for those seeking to connect to or link with the security-based swap data repository;

(3) A description of the security-based swap data repository's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data, as described in Rule 13n–6;

(4) A description of the security-based swap data repository's policies and procedures reasonably designed to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity, as described in Rule 13n–9(b)(1);

(5) A description of the security-based swap data repository's policies and procedures regarding its non-commercial and/or commercial use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any other person;

(6) A description of the security-based swap data repository's dispute resolution procedures involving market participants, as described in Rule 13n–5(b)(6);

(7) A description of all the security-based swap data repository's services, including any ancillary services;

(8) The security-based swap data repository's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates; and

(9) A description of the security-based swap data repository's governance arrangements.

§ 240.13n–11 Designation of chief compliance officer of security-based swap data repository.

(a) *In general.* Each security-based swap data repository shall identify on Form SDR (17 CFR 249.1500) a person who has been designated by the board to serve as a chief compliance officer of the security-based swap data repository. The compensation and removal of the chief compliance officer shall require the approval of a majority of the security-based swap data repository's board.

(b) *Definitions.* For purposes of this section—

(1) *Affiliate* of a security-based swap data repository means a person that, directly or indirectly, controls, is controlled by, or is under common control with the security-based swap data repository.

(2) *Board* means the board of directors of the security-based swap data repository or a body performing a function similar to the board of directors of the security-based swap data repository.

(3) *Director* means any member of the board.

(4) *EDGAR Filer Manual* has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11).

(5) *Material change* means a change that a chief compliance officer would reasonably need to know in order to oversee compliance of the security-based swap data repository.

(6) *Material compliance matter* means any compliance matter that the board would reasonably need to know to oversee the compliance of the security-based swap data repository and that involves, without limitation:

(i) A violation of the Federal securities laws by the security-based swap data repository, its officers, directors, employees, or agents;

(ii) A violation of the policies and procedures of the security-based swap data repository by the security-based swap data repository, its officers, directors, employees, or agents; or

(iii) A weakness in the design or implementation of the policies and procedures of the security-based swap data repository.

(7) *Tag* (including the term *tagged*) means an identifier that highlights specific information submitted to the Commission that is in the format required by the EDGAR Filer Manual, as described in Rule 301 of Regulation S–T (17 CFR 232.301).

(c) *Duties.* Each chief compliance officer of a security-based swap data repository shall:

(1) Report directly to the board or to the chief executive officer of the security-based swap data repository;

(2) Review the compliance of the security-based swap data repository with respect to the requirements and core principles described in Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder;

(3) In consultation with the board or the chief executive officer of the security-based swap data repository, resolve any conflicts of interest that may arise;

(4) Be responsible for administering each policy and procedure that is required to be established pursuant to Section 13 of the Act (15 U.S.C. 78m) and the rules and regulations thereunder;

(5) Ensure compliance with the Act and the rules and regulations thereunder relating to security-based swaps, including each rule prescribed by the Commission under Section 13 of the Act (15 U.S.C. 78m);

(6) Establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—

(i) Compliance office review;

(ii) Look-back;

(iii) Internal or external audit finding;

(iv) Self-reported error; or

(v) Validated complaint; and

(7) Establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(d) *Annual reports.*

(1) *In general.* The chief compliance officer shall annually prepare and sign a report that contains a description of the compliance of the security-based swap data repository with respect to the Act and the rules and regulations thereunder and each policy and procedure of the security-based swap data repository (including the code of ethics and conflicts of interest policies of the security-based swap data repository). Each compliance report shall also contain, at a minimum, a description of:

(i) The security-based swap data repository's enforcement of its policies and procedures;

(ii) Any material changes to the policies and procedures since the date of the preceding compliance report;

(iii) Any recommendation for material changes to the policies and procedures as a result of the annual review, the rationale for such recommendation, and whether such policies and procedures

were or will be modified by the security-based swap data repository to incorporate such recommendation; and

(iv) Any material compliance matters identified since the date of the preceding compliance report.

(2) *Requirements.* A financial report of the security-based swap data repository shall be filed with the Commission as described in paragraph (f) of this section and shall accompany a compliance report as described in paragraph (d)(1) of this section. The compliance report shall include a certification that, under penalty of law, the compliance report is accurate and complete. The compliance report shall also be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual, as described in Rule 301 of Regulation S–T (17 CFR 232.301).

(e) The chief compliance officer shall submit the annual compliance report to the board for its review prior to the submission of the report to the Commission.

(f) *Financial report.* Each financial report filed with a compliance report shall:

(1) Be a complete set of financial statements of the security-based swap data repository that are prepared in accordance with U.S. generally accepted accounting principles for the most recent two fiscal years of the security-based swap data repository;

(2) Be audited in accordance with the standards of the Public Company Accounting Oversight Board by a registered public accounting firm that is qualified and independent in accordance with Rule 2–01 of Regulation S–X (17 CFR 210.2–01);

(3) Include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2–02 of Regulation S–X (17 CFR 210.2–02);

(4) If the security-based swap data repository's financial statements contain consolidated information of a subsidiary of the security-based swap data repository, provide condensed financial information, in a financial statement footnote, as to the financial position, changes in financial position and results of operations of the security-based swap data repository, as of the same dates and for the same periods for which audited consolidated financial statements are required. Such financial information need not be presented in greater detail than is required for condensed statements by Rules 10–01(a)(2), (3), and (4) of Regulation S–X (17 CFR 210.10–01). Detailed footnote disclosure that would normally be included with complete financial statements may be omitted with the exception of disclosures regarding material contingencies, long-term obligations, and guarantees. Descriptions of significant provisions of the security-based swap data repository's long-term obligations, mandatory dividend or redemption requirements of redeemable stocks, and guarantees of the security-based swap data repository shall be provided along with a five-year schedule of maturities of debt. If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the security-based swap data repository have been separately disclosed in the consolidated statements, then they need not be repeated in this schedule; and

(5) Be provided in eXtensible Business Reporting Language consistent with Rules 405 (a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S–T (17 CFR 232.405).

(g) Reports filed pursuant to paragraphs (d) and (f) of this section shall be filed within 60 days after the end of the fiscal year covered by such reports.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201; and 18 U.S.C. *et seq.* unless otherwise noted.

4. Subpart P consisting of § 249.1500 is added to read as follows:

Subpart P—Form for Registration of Security-Based Swap Data Repositories

§ 249.1500 Form SDR, application for registration as a security-based swap data repository.

[**Note:** The text of Form SDR does not, and the amendments will not, appear in the Code of Federal Regulations.]

The form shall be used for registration as a security-based swap data repository, and for the amendments to, such registration pursuant to Section 13(n) of the Exchange Act (15 U.S.C. 78m(n)).

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM SDR

APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION AS SECURITY-BASED SWAP DATA REPOSITORY UNDER THE SECURITIES EXCHANGE ACT OF 1934

GENERAL INSTRUCTIONS FOR PREPARING AND FILING FORM SDR

1. Form SDR and Exhibits thereto are to be filed electronically in a tagged data format with the Securities and Exchange Commission by an applicant for registration as a security-based swap data repository, or by a registered security-based swap data repository amending its registration, pursuant to Section 13(n) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 13n–1 thereunder. No application for registration shall be effective unless the Commission grants such registration.

2. Individuals' names shall be given in full (last name, first name, middle name).

3. Form SDR shall be signed by a person who is duly authorized to act on behalf of the security-based swap data repository.

4. If Form SDR is being filed as an application for registration, all applicable items must be answered in full. If any item is not applicable, indicate by "none" or "N/A" as appropriate.

5. Disclosure of the information specified on this form is mandatory prior to processing of an application for registration as a security-based swap data repository. The information will be used for the principal purpose of determining whether the Commission should grant or deny registration to an applicant. Except in cases where confidential treatment is requested by the applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this form will be included routinely in the public files of the Commission and will be available for inspection by any interested person. A form that is not prepared and executed in compliance with applicable requirements may be deemed as not acceptable for filing. Acceptance of this form, however, shall not constitute any finding that it has been filed as required or that the information submitted is true, current, or complete. Intentional misstatements or omissions of fact constitute federal criminal violations (*see* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a)).

6. Rule 13n–1(e) under the Exchange Act requires a security-based swap data repository to amend promptly Form SDR if any information contained in items 1 through 16, 25, and 44 of this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason.

7. For the purposes of this form, the term "applicant" includes any applicant for registration as a security-based swap data repository or any registered security-based swap data repository that is amending Form SDR.

8. Applicants filing Form SDR as an amendment (other than an annual amendment) need file only the cover page (items 1 through 3), the signature page (item 12), and any pages on which an answer is being amended, together with such exhibits as are being amended. An applicant submitting an amendment represents that all unamended items and exhibits remain true, current, and complete as previously filed.

DEFINITIONS: Unless the context requires otherwise, all terms used in this form have the same meaning as in the Exchange Act, as amended, and in the rules and regulations of the Commission thereunder.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM SDR

APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION AS SECURITY-BASED SWAP DATA REPOSITORY UNDER THE SECURITIES EXCHANGE ACT OF 1934

_____

(Exact Name of Applicant as Specified in Charter)

_____

(Address of Principal Executive Offices)

If this is an APPLICATION for registration, complete in full and check here ☐

If this is an AMENDMENT to an application, or to an effective registration (including an annual amendment), list all items that are amended and check here ☐

_____

_____

_____

GENERAL INFORMATION

1. Name under which business is conducted, if different than name specified herein: _____

_____

2. If name of business is amended, state previous business name: _____

_____

3. Mailing address, if different than address specified herein: _____

_____

(Number and Street)

_____

(City) (State) (Zip Code)

4. List of principal office(s) and address(es) where security-based swap data repository activities are conducted:

Office	Address

5. If the applicant is a successor (within the definition of Rule 12b–2 under the Exchange Act) to a previously registered security-based swap data repository, please complete the following:

a. Date of succession _____

b. Full name and address of predecessor security-based swap data repository

_____

(Name)

_____

(Number and Street)

_____

(City) (State) (Zip Code)

6. List all asset classes of security-based swaps for which the applicant is collecting and maintaining or for which it proposes to collect and maintain.

_____

_____

7. Furnish a description of the function(s) that the applicant performs or proposes to perform. _____

_____

_____

_____

BUSINESS ORGANIZATION

8. Applicant is a:

☐ Corporation

☐ Partnership

☐ Other Form of Organization (Specify) _____

9. If applicant is a corporation:

a. Date of incorporation _____

b. Place of incorporation or state/country of formation _____

10. If Applicant is a partnership:

a. Date of filing of partnership articles _____

b. Place where partnership agreement was filed _____

11. Applicant understands and consents that any notice or service of process, pleadings, or other documents in connection with any action or proceeding against the applicant may be effectuated by certified mail to the officer specified or person named below at the U.S. address given. Such officer or person cannot be a Commission member, official, or employee.

(Name of Person or, if Applicant is a Corporation, Title of Officer) _____

(Name of Applicant or Applicable Entity) _____

(Number and Street) _____

(City) (State) (Zip Code) _____

(Area Code) (Telephone Number)

12. SIGNATURES: Applicant has duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this _____day of _____,____. Applicant and the undersigned hereby represent that all information contained herein is true, current, and complete. It is understood that all required items and exhibits are considered integral parts of this form and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed. If the applicant is a non-resident security-based swap data repository, Applicant and the undersigned further represent that the applicant can, as a matter of law, provide the Commission with prompt access to the applicant's books and records and that the applicant can submit to an onsite inspection and examination by the Commission. For purposes of this certification, "non-resident security-based swap data repository" means (i) in the case of an individual, one who resides in or has his principal place of business in any place not in the United States; (ii) in the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or (iii) in the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.

(Name of Applicant) _____

(Signature of General Partner, Managing Agent or Principal Officer) _____

(Title) _____

Exchange Act that owns 10 percent or more of the applicant's stock or that, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of the applicant. State in Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

14. Attach as Exhibit B the following information about the chief compliance officer who has been appointed by the board of directors of the security-based swap data repository or a person or group performing a function similar to such board of directors:
   a. Name
   b. Title
   c. Date of commencement and, if appropriate, termination of present term of position
   d. Length of time the chief compliance officer has held the same position
   e. Brief account of the business experience of the chief compliance officer over the last five years
   f. Any other business affiliations in the securities industry or OTC derivatives industry
   g. Details of:
   (1) any order of the Commission with respect to such person pursuant to Sections 15(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3) of the Exchange Act;
   (2) any conviction or injunction of a type described in Sections 15(b)(4)(B) or (C) of the Exchange Act within the past ten years;
   (3) any action of a self-regulatory organization with respect to such person imposing a final disciplinary sanction pursuant to Sections 6(b)(6), 15A(b)(7), or 17A(b)(3)(G) of the Exchange Act;
   (4) any final action by a self-regulatory organization with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by, such organization of a member thereof; and
   (5) any final action by another federal regulatory agency, including the Commodity Futures Trading Commission, any state regulatory agency, or any foreign financial regulatory authority resulting in:
   i. a finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical;
   ii. a finding that such person has been involved in a violation of any securities-related regulations or statutes;
   iii. a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted;
   iv. an order entered, in the past ten years, against such person in connection with a securities-related activity; or
   v. any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related business or a restriction of such person's activities.

15. Attach as Exhibit C a list of the officers, directors, governors, and persons performing similar functions, and the members of all standing committees grouped by committee of the security-based swap data repository or of the entity identified in item 18 that performs the security-based swap data repository activities of the applicant, indicating for each:
   a. Name
   b. Title
   c. Dates of commencement and, if appropriate, termination of present term of office or position
   d. Length of time each present officer, director, governor, persons performing similar functions, or member of a standing committee has held the same office or position
   e. Brief account of the business experience of each officer, director, governor, persons performing similar functions, or member of a standing committee over the last five years
   f. Any other business affiliations in the securities industry or OTC derivatives industry
   g. Details of:
   (1) any order of the Commission with respect to such person pursuant to Sections l5(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3) of the Exchange Act;
   (2) any conviction or injunction of a type described in Sections l5(b)(4)(B) or (C) of the Exchange Act within the past ten years;
   (3) any action of a self-regulatory organization with respect to such person imposing a final disciplinary sanction pursuant to Sections 6(b)(6), l5A(b)(7), or 17A(b)(3)(G) of the Exchange Act;
   (4) any final action by a self-regulatory organization with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by, such organization of a member thereof; and
   (5) any final action by another federal regulatory agency, including the Commodity Futures Trading Commission, any state regulatory agency, or any foreign financial regulatory authority resulting in:
   i. a finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical;
   ii. a finding that such person has been involved in a violation of any securities-related regulations or statutes;
   iii. a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted;
   iv. an order entered, in the past ten years, against such person in connection with a securities-related activity; or
   v. any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related business or a restriction of such person's activities.

16. Attach as Exhibit D a copy of documents relating to the governance arrangements of the applicant, including, but not limited to, the nomination and selection process of the members on the applicant's board of directors, a person or group performing a function similar to a board of directors (collectively, "board"), or any committee that has the authority to act on behalf of the board; the responsibilities of each of the board and such committee; the composition of each board and such committee; and the applicant's policies and procedures reasonably designed to ensure that the applicant's senior management and each member of the board or such committee possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the applicant, to have a clear understanding of their responsibilities, and to exercise sound judgment about the applicant's affairs.

17. Attach as Exhibit E a copy of the constitution, articles of incorporation or association with all amendments thereto, existing by-laws, rules, procedures, and

instruments corresponding thereto, of the applicant.

18. Attach as Exhibit F a narrative and/or graphic description of the organizational structure of the applicant. Note: If the security-based swap data repository activities of the applicant are conducted primarily by a division, subdivision, or other segregable entity within the applicant's corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit F the description that applies to the segregable entity.
19. Attach as Exhibit G a list of all affiliates of the security-based swap data repository and indicate the general nature of the affiliation. For purposes of this application, an "affiliate" of a security-based swap data repository means a person that, directly or indirectly, controls, is controlled by, or is under common control with the security-based swap data repository.
20. Attach as Exhibit H a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the applicant or any of its affiliates is a party or to which any of its property is the subject. Include the name of the court or agency in which the proceeding(s) are pending, the date(s) instituted, the principal parties to the proceeding, a description of the factual basis alleged to underlie the proceeding(s) and the relief sought. Include similar information as to any such proceeding(s) known to be contemplated by any governmental agencies.
21. Attach as Exhibit I copies of all material contracts with any security-based swap execution facility, clearing agency, central counterparty, or third party service provider. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used. In addition, include a list of security-based swap execution facilities, clearing agencies, central counterparties, and third party service providers with whom the applicant has entered into material contracts.
22. Attach as Exhibit J procedures implemented by the applicant to minimize conflicts of interest in the decision-making process of the security-based swap data repository and to resolve any such conflicts of interest.

EXHIBITS—FINANCIAL INFORMATION

23. Attach as Exhibit K a balance sheet, statement of income and expenses, statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the applicant. If a balance sheet and statements certified by an independent public accountant are available, such balance sheet and statement shall be submitted as Exhibit K. Alternatively, a financial report, as described in Rule 13n–11(f) under the Exchange Act, may be filed as Exhibit K.
24. Attach as Exhibit L a balance sheet and statement of income and expenses for each affiliate of the security-based swap data repository as of the end of the most recent fiscal year of each such affiliate. Alternatively, identify, if available, the most recently filed Annual Report on Form 10–K under the Exchange Act for any such affiliate as Exhibit L.
25. Attach as Exhibit M the following:
    a. A complete list of all dues, fees, and other charges imposed, or to be imposed, as well as all discounts or rebates offered, or to be offered, by or on behalf of the applicant for its services, including the security-based swap data repository's services and any ancillary services, and identify the service(s) provided for each such due, fee, other charge, discount, or rebate;
    b. A description of the basis and methods used in determining at least annually the level and structure of the services as well as the dues, fees, other charges, discounts, or rebates listed in paragraph a of this item; and
    c. If the applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed or any discount or rebate offered for the same or similar services, then state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differences.

EXHIBITS—OPERATIONAL CAPABILITY

26. Attach as Exhibit N a narrative description, or the functional specifications, of each service or function listed in item 7 and performed as a security-based swap data repository. Include a description of all procedures utilized for the collection and maintenance of information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by market participants.
27. Attach as Exhibit O a list of all computer hardware utilized by the applicant to perform the security-based swap data repository functions listed in item 7, indicating:
    a. Name of manufacturer and manufacturer's equipment identification number;
    b. Whether such hardware is purchased or leased (If leased, state from whom leased, duration of lease, and any provisions for purchase or renewal); and
    c. Where such equipment (exclusive of terminals and other access devices) is physically located.
28. Attach as Exhibit P a description of the personnel qualifications for each category of professional, non-professional, and supervisory employees employed by the security-based swap data repository or the division, subdivision, or other segregable entity within the security-based swap data repository as described in item 18.
29. Attach as Exhibit Q a description of the measures or procedures implemented by the applicant to provide for the security of any system employed to perform the functions of the security-based swap data repository. Include a general description of any physical and operational safeguards designed to prevent unauthorized access (whether by input or retrieval) to the system. Describe any circumstances within the past year in which the described security measures or safeguards failed to prevent any such unauthorized access to the system and any measures taken to prevent a reoccurrence. Describe any measures used by the applicant to satisfy itself that the information received or disseminated by the system is accurate.
30. Where security-based swap data repository functions are performed by automated facilities or systems, attach as Exhibit R a description of all backup systems or subsystems that are designed to prevent interruptions in the performance of any such function as a result of technical malfunctions or otherwise in the system itself, in any permitted input or output system

connection, or as a result of any independent source.

31. Attach as Exhibit S the following:
   a. For each of the security-based swap data repository functions described in item 7:
   (1) quantify in appropriate units of measure the limits on the security-based swap data repository's capacity to receive (or collect), process, store, or display the data elements included within each function; and
   (2) identify the factors (mechanical, electronic or other) that account for the current limitations reported in answer to (1) on the security-based swap data repository's capacity to receive (or collect), process, store, or display the data elements included within each function.
   b. If the applicant is able to employ, or presently employs, its system(s) for any use other than for performing the functions of a security-based swap data repository, state the priorities of assignment of capacity between such functions and such other uses, and state the methods used or able to be used to divert capacity between such functions and other uses.

EXHIBITS—ACCESS TO SERVICES AND DATA

32. Attach as Exhibit T the following:
   a. State the number of persons who subscribe, or who have notified the applicant of their intention to subscribe, to the security-based swap data repository's services.
   b. For each instance during the past year in which any person has been prohibited or limited with respect to access to services offered or data maintained by the applicant, indicate the name of each such person and the reason for the prohibition or limitation.
   c. For each service that is furnished in machine-readable form, state the storage media of any service furnished and define the data elements of such service.
33. Attach as Exhibit U copies of all contracts governing the terms by which persons may subscribe to the security-based swap data repository services and any ancillary services provided by the applicant. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used.
34. Attach as Exhibit V a description of any specifications, qualifications, or other criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any security-based swap data repository services offered or data maintained by the applicant and state the reasons for imposing such specifications, qualifications, or other criteria.
35. Attach as Exhibit W any specifications, qualifications, or other criteria required of persons who supply security-based swap information to the applicant for collection and maintenance by the applicant or of persons who seek to connect to or link with the applicant.
36. Attach as Exhibit X any specifications, qualifications, or other criteria required of any person, including, but not limited to, regulators, market participants, market infrastructures, venues from which data could be submitted to the applicant, and third party service providers who request access to data maintained by the applicant.
37. Attach as Exhibit Y policies and procedures implemented by the applicant to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the applicant and to grant such person access to such services or data if such person has been discriminated against unfairly.

EXHIBITS—OTHER POLICIES AND PROCEDURES

38. Attach as Exhibit Z policies and procedures implemented by the applicant to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a market participant or any registered entity.
39. Attach as Exhibit AA a description of safeguards, policies, and procedures implemented by the applicant to prevent the misappropriation or misuse of (a) any confidential information received by the applicant, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers; (b) material, nonpublic information; and/or (c) intellectual property by applicant or any person associated with the applicant for their personal benefit or the benefit of others.
40. Attach as Exhibit BB policies and procedures implemented by the applicant regarding its use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any person for non-commercial and/or commercial purposes.
41. Attach as Exhibit CC procedures and a description of facilities of the applicant for effectively resolving disputes over the accuracy of the transaction data and positions that are recorded in the security-based swap data repository.
42. Attach as Exhibit DD policies and procedures relating to the applicant's calculation of positions.
43. Attach as Exhibit EE policies and procedures implemented by the applicant to prevent any provision in a valid security-based swap from being invalidated or modified through the procedures or operations of the applicant.
44. Attach as Exhibit FF a plan to ensure that the transaction data and position data that are recorded in the applicant continue to be maintained after the applicant withdraws from registration as a security-based swap data repository, which shall include procedures for transferring the transaction data and position data to the Commission or its designee (including another registered security-based swap data repository).
45. Attach as Exhibit GG all of the policies and procedures required under Regulation SBSR.

EXHIBIT—LEGAL OPINION

46. If the applicant is a non-resident security-based swap data repository, then attach as Exhibit HH an opinion of counsel that the security-based swap data repository can, as a matter of law, provide the Commission with prompt access to the books and records of such security-based swap data repository and that the security-based swap data repository can, as a matter of law, submit to onsite inspection and examination by the Commission.

By the Commission.

Dated: November 19, 2010.

Elizabeth M. Murphy,

Secretary.

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